

No. 3070

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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SHIPOWNERS AND MERCHANTS TUGBOAT  
COMPANY, a Corporation,  
Appellant,  
vs.  
THE HAMMOND LUMBER COMPANY, a Cor-  
poration,  
Appellee.

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Apostles on Appeal.

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Upon Appeal from the United States District Court for  
the District of Oregon.

FILED  
NOV 13 1917  
F. D. MONCKTON,  
CLERK.



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Circuit Court of Appeals  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Matter of the Petition of the SHIP-  
OWNERS AND MERCHANTS TUGBOAT  
COMPANY, a Corporation, Owners of the  
Steam Tugs "DAUNTLESS" and "HER-  
CULES," for Limitation of Liability.

**Names and Addresses of the Attorneys of Record.**

Mr. IRA A. CAMPBELL, Merchants Exchange  
Building, San Francisco, California; SNOW,  
BRONAUGH & THOMPSON, Northwestern  
Bank Building, Portland, Oregon; and Mr.  
E. B. TONGUE, Hillsboro, Oregon, for the Ap-  
pellant.

Mr. W. S. BURNETT and Mr. WILLIAM DEN-  
MAN, 260 California Street, San Francisco,  
California; and Mr. G. C. FULTON, Astoria,  
Oregon, for the Hammond Lumber Company,  
Appellee.

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*In the District Court of the United States for the  
District of Oregon.*

No. 7220.

In the Matter of the Petition of the SHIP-  
OWNERS AND MERCHANTS TUGBOAT  
COMPANY, a Corporation, Owners of the  
Steam Tugs "DAUNTLESS" and "HER-  
CULES," for Limitation of Liability.

**Statement of Clerk U. S. District Court Under  
Subdivision 1 of Section 1 of Admiralty Rule 4.**

BE IT REMEMBERED, that on July 21, 1916,  
there was duly filed in the District Court of the  
United States for the District of Oregon a petition

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of the Shipowners and Merchants Tugboat Company, a corporation, owners of the steam tugs "Dauntless" and "Hercules," to limit liability; and on said date said petitioner filed in said court a stipulation for costs in the sum of \$250.00, with the American Surety Company of New York as surety thereon; and also on said date the court by an order duly entered in said cause fixed the amount of the stipulation to be given by said petitioner for the value of the interest of the petitioner in the said steam tugs "Dauntless" and "Hercules" at the amount of \$115,000.00; and on said date said petitioner duly filed in said court a stipulation for value in said sum of \$115,000.00, with the American Surety Company of New York as surety thereon.

On said July 21, 1916, by order entered in said cause the Court ordered that monition issue in said cause [1\*] against all persons and corporations claiming damages by reason of injuries to person or property occurring or arising upon those certain voyages of the steam tugs "Dauntless" and "Hercules" leaving the port of Astoria, Oregon, on the 9th day of September, 1911, citing them to appear before Frederick H. Drake, United States Commissioner at Portland, Oregon, on or before the 1st day of November, 1916, at 10 o'clock in the forenoon, and also citing them to appear and answer in said cause on or before said time, and further ordering that public notice of the issuance of the said monition be given by publication in a daily newspaper published in the city of Portland, County of Multnomah, State of Oregon, once a day except Sundays and holidays

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\*Page-number appearing at foot of page of original certified Transcript of Record.

for not less than fourteen consecutive days, and thereafter once a week until the return date fixed in said monition, and further directing that public notice of the issuance of said monition be also given by posting of said citation thereof in three public places in the city of Portland, county of Multnomah, State of Oregon, and also that service of said monition be made upon the Hammond Lumber Company, a corporation, by serving a copy thereof upon said corporation at its office in the city of Portland, State of Oregon. And thereupon on said date as directed by said order, the monition was duly issued and delivered to the United States Marshal for service and, on July 22, 1916, said monition was duly returned by the United States Marshal and filed in said court with proof of service of the same upon the said [2] Hammond Lumber Company; and thereafter, on November 1, 1916, there was filed by the United States Marshal a supplemental return upon the said monition showing that the same was published and posted in accordance with the said order of the Court.

On said July 21, 1916, by order of Court, by the Honorable Charles E. Wolverton, District Judge, duly entered therein, each and every corporation, person, or persons having or claiming to have any claims against the Shipowners and Merchants Tugboat Company or its steam tugs "Dauntless" and "Hercules," for any loss, damage or injury caused by or arising upon the voyages of said tugs "Dauntless" and "Hercules," leaving the port of Astoria, Oregon, on the 9th day of September, 1911, were enjoined and restrained until the further order of the Court from

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beginning, prosecuting or maintaining any suit or suits against the said tugs "Dauntless" and "Hercules" or the said Shipowners and Merchants Tugboat Company; the said order further enjoined and restrained until the further order of the Court the said Hammond Lumber Company, its agents, officers and attorneys from further prosecuting in the Circuit Court of the State of Oregon for Clatsop County a certain action theretofore commenced in said court of said Hammond Lumber Company against the Shipowners and Merchants Tugboat Company, wherein recovery was sought for the value of a raft and equipment lost upon said voyages of the "Dauntless" and "Hercules" referred to in the petition for limitation of liability herein; and further enjoining and restraining until the further order of the Court the Circuit Court of the State of Oregon for Clatsop County from further proceeding in the said action [3] commenced by said Hammond Lumber Company against said Shipowners and Merchants Tugboat Company; that said restraining order was duly served by the United States Marshal upon the said Hammond Lumber Company, and proof of such service was filed in said court in said cause on July 22, 1916.

No report was filed by the said Commissioner, F. H. Drake.

On October 30, 1916, there was duly filed in said cause by the said Hammond Lumber Company exceptions to the petition of the said Shipowners and Merchants Tugboat Company, and on said date said Hammond Lumber Company filed in said cause its stipulation for costs in the sum of \$200.00 with G. B.

McLeod and Jno. T. Dougall as sureties thereon.

On November 1, 1916, said Hammond Lumber Company duly filed in said cause a claim against the said Shipowners and Merchants Tugboat Company for damages, and also on said November 1, 1916, filed in said cause its answer to the petition of the said Shipowners and Merchants Tugboat Company, praying that said petition be dismissed.

On November 6, 1916, this cause came on to be heard before the Court on the answer and claim filed by said Hammond Lumber Company and the exceptions filed by said Hammond Lumber Company to the petition herein, and on said date it was ordered that the matter stand over, and that all proceedings herein be postponed until December 4, 1916, and that the exceptions to the petition be heard on the 4th day of December, 1916, unless otherwise ordered by the Court, and that the petitioner have until said 4th day of December, 1916, in which to move, plead, or except to the answer and claim filed by the Hammond Lumber Company.

On December 4, 1916, by an order entered in said cause [4] further proceedings in this cause were continued until the United States Circuit Court of Appeals for the Ninth Circuit should pass upon the application of the Hammond Lumber Company for a writ of prohibition, and that the petitioner be relieved from answering or further appearing herein until the expiration of ten days from and after the determination of said application for a writ of prohibition.

On the 20th day of July, 1917, there was duly filed in said cause a motion of the Hammond Lumber

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Company to dissolve the injunction heretofore issued in this cause against it and the Circuit Court of the State of Oregon for Clatsop County, or for the dismissal of the petition for limitation of liability herein.

Thereafter on Monday, the 23d day of July, 1917, the cause came on to be heard before the Honorable Robert S. Bean, District Judge, upon the exceptions of the Hammond Lumber Company to the petition herein, and upon the motion of the said Hammond Lumber Company to dissolve the injunction heretofore issued herein against said Hammond Lumber Company and the Circuit Court of the State of Oregon for the County of Clatsop, or for a dismissal of the petition of said petitioner to limit liability, and upon the motion made by the said petitioner in open court at the commencement of the said hearing on said date to strike from the cause the motion of the Hammond Lumber Company filed July 20, 1917, for a dissolution of the injunction or to dismiss the petition herein and to strike from the cause the affidavit and exhibits which are attached to the said motion upon the ground that said motion comes too late in the proceeding, and upon the further ground that said motion contains allegations, denials and assertions which are not properly brought before the Court in this manner, the said petitioner appearing at said hearing by Mr. Ira A. Campbell and Mr. MacCormac Snow, its proctors, and the Hammond Lumber Company appearing by Mr. W. S. Burnett and Mr. George C. Fulton, its proctors, and said exceptions and motion were taken under advisement by the Court.

On September 10, 1917, the Court filed in said cause its opinion upon said exceptions and motion, and on Thursday, [5] the 20th day of September, 1917, there was duly filed and entered in said court the final decree dismissing the petition of the said petitioner to limit its liability, but continuing the injunction in this cause for ten days to enable petitioner to perfect its appeal.

Thereafter, on September 22, 1917, by order of Court duly entered in said cause, the amount of the supersedeas bond to be given upon appeal herein was fixed at the sum of \$10,000.00. Thereafter, on the 29th day of September, 1917, said petitioner Ship-owners and Merchants Tugboat Company filed in said cause its petition for appeal and on said date filed its supersedeas bond on appeal in the sum of \$10,000.00, with William Babcock and W. J. Gray, as sureties thereon, which bond was duly approved by the Honorable Robert S. Bean, District Judge.

Thereafter on the 5th day of October, 1917, there was duly filed in said cause the cost bill of the said Hammond Lumber Company and costs thereon were taxed in the sum of \$26.10.

Afterwards, on the 19th day of October, 1917, there was duly filed in said cause the assignment of errors on appeal.

G. H. MARSH,  
Clerk. [6]

*In the District Court of the United States for the  
District of Oregon.*

July Term, 1916.

BE IT REMEMBERED, that on the 21st day of July, 1916, there was duly filed in the District Court of the United States for the District of Oregon, a Petition to Limit Liability, in words and figures as follows, to wit: [7]

*In the District Court of the United States for the  
District of Oregon.*

No. 7220.

In the Matter of the Petition of SHIOPWNERS  
AND MERCHANTS TUGBOAT COM-  
PANY, a Corporation, Owners of the Steam  
Tugs "DAUNTLESS" and "HERCULES"  
for Limitation of Liability.

**Petition of Shipowners and Merchants Tugboat  
Company to Limit Liability.**

The petition of the Shipowners and Merchants Tugboat Company, a corporation, for limitation of liability, civil and maritime, respectfully shows:

**I.**

That petitioner herein, Shipowners and Merchants Tugboat Company, is a corporation duly organized and existing under and by virtue of the laws of the State of California, and maintains its principal place of business in the city and county of San Francisco, said State.

**II.**

That petitioner now is and was at all the times

hereinafter mentioned, the owner of the American steam tugs "Dauntless" and "Hercules," together with their engines, boilers, boats, tackle, apparel, furniture and appurtenances.

### III.

That heretofore on the 9th day of September, 1911, the Hammond Lumber Company, a corporation, delivered a large raft of piling to the master of petitioner's tug "Dauntless" [8] in the lower reaches of the Columbia River to be towed to the port of San Francisco, California; that said tug was made fast to said raft by means of a long steel towing hawser attached to the towing machine on said tug and fastened to said raft by means of a long heavy chain attached to said raft by the employees of said Hammond Lumber Company, who constructed said raft; that the master of said tug "Dauntless" was unable to secure the services of a bar tug to assist him with said raft out of the Columbia River and across the bar at the entrance thereof, and thereupon said master accepted the assistance of said tug "Hercules," which was made fast to said tug "Dauntless" by means of a long steel towing hawser attached to the towing machine on said tug "Hercules" to the forward bitts of said tug "Dauntless."

That upon said tugs being made fast to each other and to the said raft, as aforesaid, they proceeded with said raft down the Columbia River from Astoria, and continued during the afternoon through the channel at the entrance of said river toward the open sea; that at the time said tugs started upon said tow, the weather, sea, and tidal conditions were favorable to a successful towing of the said raft

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across the bar; that in making said tow said tugs kept in the usual channel down the said river taken by vessels proceeding to sea, passing the usual and safe distance off and to the northward of the buoys marking the southerly side of said channel at the entrance to said river; that at or about the time when the said raft reached a point abreast of Channel Buoy Number 4, the raft and tugboats aforesaid encountered exceptionally heavy swells; that the raft was an unwieldy tow against which the said heavy swells beat with a force which the "Dauntless" and the "Hercules" could not combat; that the tide [9] was ebbing at the time in question and the force of the ebb tide was increasing at the time when said raft came abreast of Channel Buoy Number 4, and continued to increase at all times thereafter until said raft was lost, as hereinafter alleged; that by reason of the sea, swell, tide, currents, said raft sheered and bent with the waves and became wholly unmanageable; that notwithstanding said conditions the masters and crews of said tugs exerted every effort to save said raft and to tow the same to sea, but despite all the efforts so put forth, and notwithstanding the efficient and careful navigation of said tugs, said raft was gradually turned and swept broadside against the sea and swells until the after end of said raft tailed off toward the breakers on Peacock Spit; that said tugs continued to pull upon said raft long after said raft had passed out of the marked channel of the river and after the tugs themselves had been pulled by said raft out of said channel and into the dangerous waters of Peacock Spit; that said tugs continued to put forth efficient efforts to save said

raft until after it had passed the Black Buoy, known as Buoy Number 1, marking the northerly side of the channel off Peacock Spit, when suddenly and without warning said raft, impelled and irresistibly controlled by said high sea and the swells and the currents appurtenant thereto, pulled the towing hawser off the towing machine on said tug "Dauntless," and thereupon said raft drifted into the breakers on Peacock Spit and a large part of the contents thereof became lost.

That thereafter said tug "Dauntless" completed its voyage to the port of San Francisco and said tug "Hercules" returned to the port of Astoria.

#### IV.

That said tugs "Dauntless" and "Hercules" were and are [10] used and employed by petitioner herein in the general business of towing between ports and places on the eastern shores of the Pacific Ocean and the sounds, bays, rivers, and canals adjacent thereto; that during all the times of the aforesaid towage of said raft said tugs were staunch, powerful, able and seaworthy vessels, and were at all times fully and properly manned, officered, equipped, supplied, and appareled, and were well and sufficiently fitted and supplied with suitable boilers, machinery, towing machines, lines, hawsers, boats, tackle, apparel, appliances and stores, all in good order and condition and sufficient for the business and voyage upon which they were then engaged and employed in towing said raft of piling as aforesaid; that on the voyages of the "Dauntless" and the "Hercules" described in the third paragraph of this petition no officer of your petitioner was present on

the said tugs, or either thereof, but the said tugs were entrusted for purposes of navigation to the respective masters thereof, who were navigators of large experience, thoroughly competent, and in all respects qualified for the work so entrusted to them.

V.

That the loss of said raft of piling and all other damages and injuries, whether of persons or of property, done, occasioned and incurred upon the said voyages of said tugs were done, occasioned and incurred without the consent, or privity, or knowledge, or design, or neglect, of petitioner herein.

VI.

That the owner of said raft, to wit, the said [11] Hammond Lumber Company, a New Jersey corporation, maintaining offices in the Yeon building in Portland, Oregon, heretofore, and on or about the 9th day of November, 1911, commenced in the Circuit Court of the State of Oregon for Clatsop County, an action against petitioner herein, based on contentions, particularly and at large, set up in the second amended complaint of the said Hammond Lumber Company, hereinafter more particularly referred to, to the effect that the said tugs "Dauntless" and "Hercules" were negligently navigated; that the hawser whereby the said raft was attached to the "Dauntless" was insecurely fastened on the towing machine of the "Dauntless"; that the steam on the said towing machine was permitted to run down; that the said masters of the said tugs negligently refrained from calling assistance to their aid after they should have known, and did in fact

know, that the loss of the raft was inevitable in the absence of assistance because of the stress of conditions which the said tugs encountered near the mouth of the Columbia river; that in the original complaint filed in the said action damages were claimed by reason of the negligent acts of your petitioner's agents, the masters of the said tugs and the engineers thereof in the sum of \$71,249.90.

## VII.

That thereafter and on or about the 27th day of February, 1912, petitioner herein filed in the United States District Court for the Northern District of California, in Admiralty, a petition for limitation of its liability wherein and whereby petitioner claimed and reserved, as authorized by Rule 56 of the Admiralty Rules of the Supreme Court of the United States, the right to contest any liability for [12] the loss of said raft, and further prayed that in case said Court should find that any liability existed upon the part of petitioner by reason of injuries to persons or loss or damage to property, done, occasioned, or incurred upon said voyages of said tugs, and particularly for the loss of said raft that such liability should not be allowed to exceed the value of said tug "Dauntless" and her freight, if any, pending, or if said Court should find that liability existed on the part of said tug "Hercules," or of your petitioner for any act or neglect of said tug, that such liability should in no event be allowed to exceed the value of said tugs "Dauntless" and "Hercules," and the freight, if any, pending, at the close of their respective voyages upon which said raft was lost;

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that upon the filing of said petition an order was entered referring said case to the Honorable James P. Brown, United States Commissioner, for the purpose of making due appraisement of the value of the interest of petitioner in said tugs "Dauntless" and "Hercules," their boilers, engines, boats, tackle, apparel, furniture, and appurtenances, as the same existed at the close of their respective voyages on which said raft mentioned in said petition was lost, together with the amount of their freight pending, if any existed; that due notice, as required in said order, was given said Hammond Lumber Company, and thereafter a hearing for the purpose of making said appraisement was held by the said Commissioner, at which petitioner and said Hammond Lumber Company produced witnesses who testified as to the value of said tugs "Dauntless" and "Hercules," and their freight, if any, pending at the close of said voyages; that upon the conclusion of the said hearing, the matter was submitted by the [13] petitioner and said Hammond Lumber Company to said Commissioner, who thereafter made his return into said court, finding and appraising the value of the interest of petitioner in said tug "Dauntless," her engines, etc., at the sum of forty-five thousand dollars (\$45,000.00), and the value of the interest of petitioner in the said tug "Hercules," her engines, etc., at the sum of seventy thousand dollars (\$70,000.00), and further finding that no freight whatsoever was pending at the termination of the respective voyages of said tugs "Dauntless" and "Hercules" upon which said raft was lost; that due

notice of the filing of the report of the said Commissioner was given said Hammond Lumber Company, and the latter not filing any exceptions to the report of said Commissioner, the said report was thereafter, and on the 29th day of March, 1912, confirmed by said Court, and the value of petitioner's interests in said tugs "Dauntless" and "Hercules," their engines, etc., at the close of said voyages upon which said raft was lost, was fixed at the respective sums of forty-five thousand dollars (\$45,000.00) and seventy thousand dollars (\$70,000.00), or a total sum of one hundred and fifteen thousand dollars (\$115,000.00).

That thereafter, on or about July 30, 1912, said Hammond Lumber Company, appeared and filed in said proceedings a claim for the loss of said raft in the sum of seventy-one thousand two hundred forty-nine dollars and ninety cents (\$71,249.90), with interest and costs, and on the same date also filed exceptions to the petition of petitioner, and prayed a dismissal of said petition, upon the grounds that said petition failed to show that the value of said tugs [14] were, or that the value of either of them was, less than the loss, damage or injury done, suffered, or incurred by reason of said acts described therein, to wit, the loss of said raft, and that hence said petition failed to show that there is, or would be, any limitation of liability; that due and regular hearing was had before said court upon said motion to dismiss, and thereafter, and on or about January 10, 1914, said Court rendered its decision and entered a final decree, dismissing said petition as

against said Hammond Lumber Company, upon the ground that if there was any liability at all, both tugs, being engaged in the same venture were equally liable, and that inasmuch as the value of said tugs exceeded the demands of said Hammond Lumber Company for the loss of said raft, the proceedings should be dismissed.

### VIII.

That thereafter petitioner appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the aforesaid decree of said District Court dismissing said petition; that due presentation of said cause on appeal was made by oral argument and on written briefs, and thereafter, on November 17, 1914, said United States Circuit Court of Appeals rendered its decision therein, wherein it pointed out, in its opening statement of facts, that the value of the tugs "Dauntless" and "Hercules" were the sums of forty-five thousand dollars (\$45,000.00) and seventy thousand dollars (\$70,000.00) respectively, and the amount of the claim of the said Hammond Lumber Company for the value of said raft was the sum of [15] seventy-one thousand two hundred forty-nine dollars and ninety cents (\$71,249.90), and affirmed said decree upon the ground that, as the value of said tugs exceeded the amount of the claim of the said Hammond Lumber Company, the proceeding should be dismissed.

That thereafter a petition for rehearing was filed in said Circuit Court of Appeals by petitioner, which petition was denied, and following thereupon, the

mandate of said court was returned to said District Court and was duly entered therein.

## IX.

That subsequently, and on the 18th day of November, 1915, the aforesaid cause, pending in the Circuit Court of the State of Oregon for the county of Clatsop, was brought on for trial, and during the course of the trial of said cause, and on or about the first day of December, 1915, said Hammond Lumber Company, plaintiff therein, amended its complaint, by leave of said Circuit Court of the State of Oregon, for Clatsop County, on proceedings properly had therefor, and in and by the amendment so permitted, on or about the first day of December, 1915, the said Hammond Lumber Company, enlarged its demand against your petitioner from the sum of seventy-one thousand two hundred forty-nine dollars and ninety cents (\$71,249.90), as alleged in its original complaint, and as [16] alleged in its first amended complaint, and in its claim filed in the said proceedings had for the limitation of your petitioner's liability in the United States District Court for the Northern District of California, and on which allegations as to the *quantum* of its damage, the decision so rendered in the said District Court for the Northern District of California and in the United States Circuit Court of Appeals for the Ninth Circuit, were based, to the full sum of one hundred and ten thousand nine hundred eighty-three dollars and thirteen cents (\$110,983.13), which latter sum was the amount for which the said Hammond Lumber Company claimed judgment in and by the prayer of

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its second amended complaint so filed in said Circuit Court of the State of Oregon for Clatsop County, on or about the first day of December, 1915, by leave of said Circuit Court for Clatsop County aforesaid.

That the said second amended complaint so filed by the Hammond Lumber Company contained allegations on its behalf to the effect that, as measured by the market price of piling and spars in the city of San Francisco in the month of September, 1911, the said raft, with its paraphernalia, was worth a sum in excess of one hundred and ten thousand nine hundred eighty-three dollars and thirteen cents (\$110,983.13), for which judgment was demanded; and that evidence was admitted on the trial of said cause tending to support the allegations of the said second amended complaint in that behalf; that in the prayer of said second amended complaint, the said [17] Hammond Lumber Company did not ask for interest on the said sum of \$110,983.13, but that after the said cause was submitted to the court, leave was taken by the Hammond Lumber Company to file a brief with the said court, and thereafter and on the 21st day of June, 1916, a brief was served upon your petitioner and filed with the said court, wherein the said Hammond Lumber Company, on page 48 of the said brief, alleged that its total loss in the destruction of the raft hereinbefore referred to, was the sum of \$117,288.69; that in and by said brief the said Hammond Lumber Company credited your petitioner with the sum of \$6135.47, and claimed a total loss to the Hammond Lumber Company of \$111,153.22, whereupon the said Hammond

Lumber Company, in and by its said brief, set forth the following claim, to wit: "To this should be added interest from September 9, 1911, at six per cent per annum." That the claim of the said Hammond Lumber Company, as set forth in the said brief is in excess of \$140,000, and largely exceeds the aforesaid appraised value of your petitioner's interest in said tugs "Dauntless" and "Hercules" as the same existed at the close of the respective voyages on which said raft was lost.

## X.

Your petitioner further shows the Court that under the law of the State of Oregon, as defined by the decisions of the Supreme Court of Oregon, which is the court of last resort therein, it is competent for the Circuit Court of the State of Oregon for Clatsop County [18] to render judgment against your petitioner in said cause in a sum in excess of \$410,000, notwithstanding the fact that the prayer for judgment contained in the second amended complaint, so filed in said action, asks for a judgment in the sum of \$110,983.13, and the costs and disbursements of the Hammond Lumber Company therein, in case the said Circuit Court of the State of Oregon for Clatsop County should determine the question of liability against your petitioner, and should also rule with the Hammond Lumber Company on its contention therein made as to the measure of damages.

Your petitioner further shows that although the said cause pending in the Circuit Court of the State of Oregon for the county of Clatsop is an action at

law, it was tried, by stipulation of the parties before the court without the intervention of a jury, and is now under advisement in the said court, and that no findings have been filed therein and no judgment entered.

Your petitioner avers that the amount in controversy in the said action exceeds the sum of \$140,000 without counting the costs and disbursements involved therein, and that the said amount in controversy largely exceeds the value of the interest of your petitioner in the said tugs "Dauntless" and "Hercules" as the same existed at the close of their respective voyages on which said raft was lost.

#### XI.

Your petitioner claims the benefit of the limitation of liability provided for in sections 4282 to 4289, inclusive, of the Revised Statutes of the United States, and [19] the Acts of the Congress of the United States, if any, amendatory of, and supplementary to, the several sections and acts aforesaid, or any thereof; and your petitioner is now ready, able and willing, and hereby offers to give its stipulation, with sufficient sureties, conditioned for the payment into this court by your petitioner of the value of its interest in said tugs "Dauntless" and "Hercules," and their freight, if any, pending, if and when required, as they and each of them were immediately after the termination of their said respective voyages on which said raft was lost.

#### XII.

That your petitioner desires to contest its liability for the injury, loss and damage, whether to

persons, or to property, caused, occasioned and incurred upon said voyages of said tugs, and particularly the loss of said raft of piling, upon the ground and for the reason that said loss and damage, and the loss of said raft, was not caused, occasioned or incurred by any act or default of your petitioner, but was *due the* following causes:

That upon said tugs being made fast to each other, as hereinbefore alleged, they proceeded with said raft down the river from Astoria, and continued during the afternoon through the channel at the entrance of said river toward the open sea; that at the time said tugs started upon said tow, the weather, sea, and tidal conditions were favorable to a successful towing of said raft across the bar; that in making said tow, said tugs kept in the usual channel down said river taken by vessels proceeding to sea, passing the usual and safe distance off and to the northward of the buoys marking [20] the southerly side of said channel at the entrance to said river; that at or about the time when the said raft reached a point abreast of Channel Buoy Number 4, the raft and the tugboats aforesaid encountered exceptionally heavy swells; that the said raft was an unwieldy tow against which the said heavy swells beat with a force which the "Dauntless" and the "Hercules" could not combat; that the tide was ebbing at the time in question and the force of the ebb tide was increasing at the time when the raft came abreast of Channel Buoy Number 4, and continued to increase at all times thereafter until the raft was lost as hereinafter described; that the said swells

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and seas could not have been foreseen and were not foreseen by the officers and crew of said tugs; that the masters of said tugs had made careful investigation of the conditions of weather, tide, currents, and bar, prior to the beginning of said towage service, and after diligent investigation of all said matters had been advised that the conditions were propitious for undertaking the said service; that the said incoming sea and swells made it impossible to control the navigation of said raft and to carry the same across the bar into the Pacific Ocean; that by reason of the said sea, the ebb tide and the swells aforesaid, and the unwieldly character of said raft, said raft shivered from side to side; that it bent with the waves and became wholly unmanageable; that the conditions aforesaid constituted a peril of the sea which could not have been foreseen, and which petitioner could not protect against; that notwithstanding the said conditions petitioner's tugs put forth every effort to save the said raft and to take the same to sea, but notwithstanding all of the efforts of said tugs, [21] and notwithstanding the efficient and careful navigation of the tugs which were towing the said raft, the said raft was gradually turned and carried broadside against the sea and swells until the after end of the said raft tailed off toward the breakers on Peacock Spit; that the said tugs continued to pull upon the said raft long after the said raft had passed out of the marked channel of the Columbia river and after the tugs themselves had been pulled by the raft out of the said channel and into the dangerous waters of Pea-

cock Spit; that the said tugs continued to put forth efficient efforts to save the said raft until after the raft had passed the Black Buoy, known as Buoy Number 1, and marking the northerly side of the navigable channel of said river, when suddenly and without warning the said raft, impelled and irresistibly controlled by said high sea and the swells and current appurtenant thereto, pulled the towing hawser off the towing machine on said tug "Dauntless," and thereupon the raft drifted further into the breakers on Peacock Spit, and a large part of its contents became lost.

That said tugs "Dauntless" and "Hercules" were large and powerful sea-going tugs, and were fully equipped with large and powerful towing machines of the latest improved pattern, and at the time said tugs began said towage service, and during all times thereafter, they were in every respect seaworthy in hull and machinery, and said towing machines were in every part in a thorough efficient state; that said tugs were manned with a full complement of experienced officers and crew and were commanded by competent masters of long experience in towing rafts of the character in tow, and who were in every respect familiar with the conditions of the [22] Columbia river and bar, and the channels thereof, and the condition of weather, sea, tides, and currents reasonably to be apprehended in towing said raft to sea; that the hawser with which said tug "Dauntless" was made fast to said raft was made of steel, and of size and strength sufficient to properly hold said raft under all conditions reasonably to be anti-

cipated, and was in every respect properly fastened to said towing machine at the time said raft broke away from said tug.

That said raft was large and unwieldy, having a length of approximately seven hundred and twenty (720) feet and a draft of approximately twenty-three (23) feet, and by reason of its size and construction was unmanageable in a seaway, with the result that when caught by the ebbing tide and currents and heavy seas, said tugs, despite their size and power, were unable to keep said raft within the channel and from drifting to the northerly side thereof and upon Peacock Spit; that owing to the size and character of said raft it was impossible for said tugs to turn said raft around and return with it back up the river against the ebbing tide; that said Hammond Lumber Company well knew that the season was growing late for making a tow of said character, and well knew the dangers of the seas then likely to be encountered at the entrance of said river, but notwithstanding the knowledge so possessed, said Hammond Lumber Company assumed said risks and directed and consented that the said raft should be towed on the 9th day of September, 1911, by said tugs "Dauntless" and "Hercules," notwithstanding the dangerous navigation incident [23] to the said voyage.

### XIII.

That the loss of said raft was in no respect due to any unseaworthiness or inefficiency on the part of the said tugs, or their machinery or equipment, or to any unskillfulness or negligence on the part of any of the masters, officers or crews of the said tugs, or to

any errors in the navigation thereof, but the loss was entirely due to the perils of the sea and to the inherent risks and dangers of the enterprise and to the unwieldy character of said raft, and to the manner in which said raft was constructed, and the size, weight, and length of the towing chains, and the manner in which they were made and fastened to said raft by the said Hammond Lumber Company, and to the inability of the said tugs, or any tugs, to handle the same as against the tides, currents, and swells, hereinbefore specified.

#### XIV.

That all and singular the premises are true and within the Admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, your petitioner prays:

That this Court will enter an order consenting and permitting petitioner to file a stipulation or undertaking herein, with sureties, conditioned for the payment into court of the value of petitioner's interest in the said tugs "Dauntless" and "Hercules" at the close of their aforesaid voyages upon which said raft was lost, and that this Court will, upon the filing of said stipulation by your petitioner, issue, or cause to be issued, a monition against the Hammond Lumber Company, and all other persons claiming damages of your petitioner by reason of injury [24] to persons or to property occurring or arising upon said voyages, or resulting from the loss of said raft, citing them, and each of them, to appear before this Court, and there make due proof of their respective claims, at a time to be therein named, as to all which claims your petitioner will contest its liability independent

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of the limitation of liability claimed under the stat-  
utes above stated.

That this Court may be pleased to determine that no liability exists on the part of your petitioner for any act or thing done, or occasioned by said tugs "Dauntless" and "Hercules" upon said voyages upon which said raft was lost, and particularly that no liability exists on the part of said petitioner for the loss of said raft, and that this Court may be pleased to release the aforesaid stipulation filed herein.

That in case it shall be found that any liability exists upon the part of your petitioner by reason of injury to persons, or loss or damage to property, done, occasioned, or incurred, upon said voyages, and particularly the loss of said raft aforesaid (which your petitioner denies and prays may be contested in this court), then that said liability shall in no event be permitted by this Court to exceed the aforesaid value of the interest of said petitioner in said tugs "Dauntless" and "Hercules" upon the close of said voyages upon which said raft was lost, as aforesaid, and that the moneys secured to be paid into this court, as aforesaid, shall and may, after payment of costs and expenses therefrom, be divided *pro rata* among the several claimants in proportion to the amount of their [25] respective claims, if any, interposed herein, as by this Court adjudged; and that in the meantime and until final judgment of this "court" shall be rendered and entered herein, an order may be entered restraining each and every corporation, person or persons, having, or claiming to have, any demands against petitioner, or said tugs

"Dauntless" or "Hercules" for any loss, damage, or injury caused by or arising upon the aforesaid voyages of said tugs "Dauntless" or "Hercules" on which said raft was lost, and particularly restraining said Hammond Lumber Company, its agents and attorneys, and said Circuit Court of the State of Oregon for Clatsop County, from further prosecuting said suit heretofore commenced in the said Circuit Court of the State of Oregon for Clatsop County, and restraining said Hammond Lumber Company, and all other persons and corporations, from prosecuting any suit against your petitioner or said tugs, or either of them, saving in this court only, in respect to the loss of said raft, and any and all claims arising on said voyages of said tugs.

And that petitioner may have and receive such other and further relief in the premises as shall be deemed meet and equitable.

SHIP OWNERS AND MERCHANTS TUG-  
BOAT COMPANY.

By WALLACE McCAMANT,  
Of Its Proctors.

IRA A. CAMPBELL,  
WALLACE McCAMANT,  
E. B. TONGUE,  
SNOW, McCAMANT & BRONAUGH,  
Proctors for Petitioner. [26]

District of Oregon,—ss.

I, Wallace McCamant, being duly sworn, depose and say that I am one of the proctors for the petitioner in the foregoing petition; that the allegations contained in the foregoing petition are true, as I verily believe.

That I make this verification for the reason that no officer, owner, manager or agent of the petitioner is now within the State of Oregon.

WALLACE McCAMANT.

Subscribed and sworn to before me this 21st day of July, 1916.

[Seal]

F. J. LICHTENBERGER,

Notary Public for Oregon.

My commission expires November 15, 1919.

Filed July 21, 1916. G. H. Marsh, Clerk. [27]

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And afterwards, to wit, on the 30th day of October, 1916, there was duly filed in said Court, Exceptions of Hammond Lumber Company to Petition, in words and figures as follows, to wit:

[28]

*In the District Court of the United States for the District of Oregon.*

In the Matter of the Petition of SHIOPWNERS AND MERCHANTS TUGBOAT COMPANY, a Corporation, Owners of the Steam Tugs "DAUNTELESS" and "HERCULES," for Limitation of Liability.

**Exceptions of Hammond Lumber Company to Petition for Limitation of Liability.**

Now comes the Hammond Lumber Company, a corporation, claimant herein, and excepting to the petition of petitioner on file herein, avers:

That the said petition fails to disclose facts sufficient to warrant a limitation of liability in this:

(a) It shows that the claim of claimant, without

interest, at the time of the loss of the log raft in said petition pleaded, was less than the value of said two tugs at said time;

(b) It shows that there was then pending a proceeding for limitation of liability in the Northern District of California, involvng the same loss of the log raft, in which the Court, with its equity powers, could have considered the alleged new facts as to the character of claimant's claim;

(c) It does not show that there are any other claims, a necessary prerequisite to the right to limit where the fund exceeds the one claim alleged. This is a matter *res adjudicata* between petitioner and claimant by virtue of a decree of the Circuit Court of Appeals, in that proceeding entitled Shipowners & Merchants Tug Boat Company v. Hammond Lumber Company, No. 2388 in said Court, and reported in 218 Fed. Rep. 161 at 165.

WHEREFORE claimant prays that said petition be dismissed with claimant's costs.

W. S. BURNETT,  
WILLIAM DENMAN,

Proctors for Hammond Lumber Company.

Filed October 30, 1916. G. H. Marsh, Clerk.

[29]

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And afterwards, to wit, on the 1st day of November, 1916, there was duly filed in said court a claim of the Hammond Lumber Company, in words and figures as follows, to wit: [30]

*In the District Court of the United States for the  
District of Oregon.*

No. —.

In the Matter of the Petition of SHIOPWNERS  
AND MERCHANTS TUGBOAT COM-  
PANY, a Corporation, Owners of the Steam  
Tugs "DAUNTLESS" and "HERCULES,"  
for Limitation of Liability.

**Claim of Hammond Lumber Company.**

Now comes Hammond Lumber Company, a corporation, claimant herein, and for its claim alleges as follows:

I.

That claimant is now, and during all of the times herein mentioned was, a private corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, and engaged in business and having an office at the City of Astoria, in Clatsop County, State of Oregon, and duly registered and licensed to do business under and by virtue of the laws of the State of Oregon; and is, and during all of the times herein mentioned was, engaged in the manufacture and sale of sawlogs, spars, and products of the forest and in the construction of sea-going rafts containing piling, spars and sawlogs.

II.

That the petitioner is now, and during all the times herein mentioned was, a private corporation duly organized and existing under and by virtue of the laws of the State of California, and was and is en-

gaged in the general towing business and in towing rafts from the port of Astoria in Oregon to port of San Francisco, California, and was during all the times herein mentioned the owner [31] of the steam tugboats "Dauntless" and "Hercules," each licensed to engage in and engaged in the general towage business and coastwise trade, in the United States and Pacific Ocean, and also engaged in the general business of towing rafts of piling, spars and sawlogs from the Columbia river to points in California.

### III.

That on the 30th day of August, 1911, the claimant and petitioner entered into a contract wherein and whereby the petitioner agreed to and with the claimant, in consideration of the sum of Two Thousand Two Hundred and Fifty Dollars (\$2,250.00), to be paid the petitioner by claimant upon the completion of the towage hereinafter described, to safely tow for the claimant a large raft of piling and spars from Flavel, in the port of Astoria, in Oregon, to the port of San Francisco, in the State of California, and thereupon and pursuant thereto, this claimant constructed in a first-class manner a large raft of piling and spars and completed the same on or about the 8th day of September, 1911, and bound the same together with large and heavy chains, wire rope cables and other appliances.

That said raft when completed on said date and at the time it became a total loss as hereinafter stated, contained 592,499 lineal feet of piling and spars, and the piling and spars in said raft were of the reasonable value of Ninety-eight Thousand Nine Hundred

'Sixty-eight Dollars and Fifty Cents (\$98,968.50). that said raft as completed, including the piling and spars and chains, wire cables, shackles, turn buckles, and equipment, was at said time of the full and reasonable value of One Hundred Twelve Thousand Nine Hundred Sixty-eight Dollars and Fifty Cents (\$112,968.50). [32]

#### IV.

That thereafter, and on the 9th day of September, 1911, pursuant to said contract aforesaid so entered into between claimant and petitioner, the claimant delivered said raft so constructed and equipped ready for sea to the petitioner at Flavel, in the port of Astoria, to be by the petitioner towed from said port to the port of San Francisco, in the State of California, and there delivered to claimant; and the said petitioner there, and on that date received and took into its possession the said raft so constructed as aforesaid, and, pursuant to said contract aforesaid, undertook to safely tow the same from said port of Astoria, in Oregon, to the port of San Francisco, in the State of California, and there deliver same to claimant. That in order to tow the same, the said petitioner used and employed the said steam tug "Dauntless" and the said steam tug "Hercules," each of which was equipped with a towing machine. That petitioner fastened the said "Dauntless" to said raft with a long towing cable, one end of which was wound around the drum of the towing machine on said "Dauntless," and the other end fastened to said raft, and the said "Hercules" was fastened to the "Dauntless" with a long towing cable leading

through the forward bits of the "Dauntless" to the towing machine of the "Hercules," being thusly equipped, said two tugs started to sea with said raft on said date aforesaid; but the said petitioner so negligently and carelessly conducted itself that the said raft was entirely lost, destroyed, and became a total loss to the claimant, for at the time the said raft was delivered to the said petitioner as aforesaid, and at the time petitioner received the same and started to tow the same to the port of San Francisco under said [33] contract aforesaid, the weather and conditions on the Columbia river, ocean and Columbia river bar were favorable but there was as usual at the then stage of the tide, of which the servants and officers of petitioner in charge of said tugs had actual notice, a northward drift of the current in the waters of the said Columbia river, and at the mouth thereof, and in the said ocean, towards, over and across a large spit on the northerly edge of the channel of said river at the mouth thereof, called and generally known as Peacock Spit, a dangerous spit near the mouth of said river where the waters of the river and ocean meet and which, if struck by said raft, or if such raft should come in contact therewith or be grounded thereon would become a wreck and total loss, all of which was well known to the petitioner, its servants, masters and officers in charge of said tugboats, and all of which dangers could have been easily and readily avoided by taking the southerly side of such channel, but the said petitioner, through its servants, masters and officers in charge of said tugs, carelessly and neg-

ligently failed and neglected to, and did not, tow said raft by the southerly course through said channel as aforesaid, but carelessly and negligently attempted to tow the same along the northerly side of the channel, and over and against the said Peacock Spit, and carelessly and negligently towed said raft so close to said spit that they lost control thereof, and the same broke away from said tugs and drifted upon said spit, and the same became and was broken and a total loss.

That at the time the said tug "Dauntless" and the said tug "Hercules" took said raft in tow, the towing machinery and appliances and the machinery and appliances to which was fastened the tow-line leading from the said tug "Dauntless" to said raft [34] and with which said tow-line was manipulated and with which said raft was towed, on said tug "Dauntless" aforesaid, was and continued to be thereafter old and worn and useless and defective, and out of repair, and the brake and brakes thereof were out of repair, and were also incapable of holding, and of insufficient strength to hold and tow said raft, and the said towing machinery and appliances on such tug "Dauntless" were, and each was, of insufficient strength to hold and tow the said raft, and particularly to hold and tow the same through the said northerly channel, and while said raft was in tow of said tug "Hercules" and said tug "Dauntless," and in the waters of the said Columbia river and near the said Peacock Spit aforesaid, and in said north channel aforesaid, by reason of said insufficient towing machinery and appliances and brake and brakes

aforesaid, and by reason of the fact that the towing machinery and appliances to which was fastened the tow-line leading from said raft aforesaid was of insufficient strength and power to hold and tow said raft, and because of the fact that the said tow-line leading from said raft and by which it was towed was not fastened to the said towing machinery on said tug "Dauntless," the said tow-line payed out and slipped loose from and became wholly detached from the said towing machinery and from said tug "Dauntless" aforesaid, and thereupon said raft drifted over and upon and against said Peacock Spit where it became wrecked and a total loss to claimant.

This claimant further avers, that at and during all the times herein mentioned, the said channel of said river, and the channel over the bar and into the said ocean, was fully one mile in width, and of sufficient depth to successfully and safely and securely tow said raft through the same to the sea. That the waters of [35] said channel gradually shallowed near said Peacock Spit, at and around which the waters are at all times very rough, and a heavy sea at all times prevails there, all of which was well known to petitioner at and during all the times herein mentioned.

That the said petitioner, by and through its said masters, and officers and navigators of said two steam tugs aforesaid, carelessly and recklessly towed said raft too close to said Peacock Spit, and into shallow water where said raft could not be successfully managed, and in great danger of destruction, although at said time there was sufficient water in the channel

of such river to safely tow said raft as aforesaid. That in making such tow as aforesaid, said petitioner, through its said officers and agents and masters of said two tugs, failed to and did not exercise maritime skill, in that said two tugboats were unskillfully and carelessly manoeuvered, the leading tug not keeping in line, so that the power thereof was not permitted to be transferred to said raft and the tow-lines on each tug were neither looked after nor watched, or cared for, but were permitted by the unskillful manoeuvering of said two tugboats, and failure to watch same, to become at times slackened, and then the full power of each tug with the added velocity of their speed thrown against the same, and such lines tightened, whereby the towing machinery of each was subjected to a great and unnecessary strain, and the raft having an unequal tow, was not at all times under control as it should have been by the exercise of ordinary maritime skill. That the towing machine on each tug was operated by steam, and required a steady high pressure of steam to successfully operate the same, but such steam pressure was permitted to run down, whereby said towing machine could not be skillfully or properly manipulated. That in order to safely tow [36] said raft, it was necessary that the tow-line running from the said raft to said "Dauntless" should have been safely and securely fastened to the towing machine by securely fastening the end of such tow-line to the flange of the drum of the towing machine thereon and winding such tow-line around such drum a sufficient number of times to maintain and keep same securely fastened

thereto and prevent same from slipping off, but by reason of the carelessness and negligence of said petitioner, such tow-line was not safely, nor was it securely fastened to the flange of the said drum wound around the same a sufficient number of times to keep same from slipping off therefrom, but was carelessly and negligently permitted to remain wholly unsecured, and allowed to pay out until wholly unwound from such drum, and held in such manner that when the strain of the two tugs was placed on such raft, it would slip off and become wholly loosened and detached therefrom, and the said raft thereby set adrift.

That while said petitioner, through its officers and masters of said two tugboats aforesaid, was towing said raft through said northerly channel, and while said raft was by reason of their carelessness and unskillfulness towed too closely to said Peacock Spit and into the shallow water, and by reason of the carelessness and negligence of the petitioner and its servants and employees and the navigators of the tugboat "Hercules" and said tugboat "Dauntless," and the unskillful manoeuvering of said tugboat "Hercules" and said tugboat "Dauntless" aforesaid, and by reason of the fact that the tow-line on said tugboat "Hercules" and the tow-line on said tugboat "Dauntless" aforesaid, and by reason of the fact that the tow-line on said tugboat "Hercules" and the tow-line on said tugboat "Dauntless" were each improperly [37] manoeuvered and handled and allowed to become slackened and then abruptly tightened and were not cared for or watched, and by

reason of the manner in which each of said tugboats was manoeuvered, and because of the fact of insufficient steam for operating the said towing machinery on each of said tugboats and because of the fact that the said tow-line running from said raft and fastened to the towing machinery on said tug "Dauntless" was not securely or safely fastened, and was permitted to unwind therefrom, and that no watch was placed thereon, or care was paid thereto, the said tow-line leading from said raft to the towing machine in said tug "Dauntless" payed out and slipped loose from and became wholly detached from said towing machinery and from said tug "Dauntless," and thereupon said raft drifted over and upon and against said Peacock Spit aforesaid and was broken up and became a total loss to the claimant herein.

That after said tow-line had become released from said tugs, and after said officers and servants of petitioner in charge of said two tugs had turned same loose, and after same had become loose, said petitioner and its servants, masters and officers in charge of said tugboats had ample time and opportunity to secure said raft and tow same safely to said port of San Francisco, but carelessly and negligently refused to and did *not so*, but abandoned the same, and the same became lost as aforesaid.

This claimant further avers that long prior to the time the tow-line which was fastened to and leading from said raft became unwound from the drum of the towing machine of the said tug "Dauntless," the petitioner, through its said masters and officers in charge of said tugs "Dauntless" and "Hercules,"

well knew, and by the exercise of ordinary care and skill should have known, that because of the ground swells, waves [38] and currents which said tugs and raft encountered near the mouth of said river that said tugs could not then tow said raft to sea without aid or assistance, against such swells and waves, and that any further attempt, without assistance, to tow said raft to sea after meeting such swells, waves and currents would surely result in the loss of said raft on said Peacock Spit but the said petitioner through its masters and servants in charge of the said two tugs, nevertheless, with such knowledge and notice, carelessly, recklessly and unskillfully persisted in attempting to tow said raft against said swells, currents and waves to sea, and carelessly, recklessly and unskillfully did not call to their, or either of their, assistance, or to their, or either of their, aid, any other tug or tugs, and did not make any attempt to hold said raft until conditions were more favorable which said tugs could have done by the exercise of ordinary care and skill, and by reason thereof, and by reason of such carelessness and negligence of the said masters and officers of said tugs, the said waves, swells and currents in said river slowly and gradually drifted and caused said raft to drift northerly and towards and upon Peacock Spit where the same became a total loss as herein alleged.

That long prior to said raft becoming unfastened from said tug "Dauntless," and long prior to its said loss, the masters of said tugs "Dauntless" and "Hercules" had ample time and ample opportunity, after

it became apparent to them and after they knew said tugs could not, under the conditions then and there prevailing, tow said raft to sea, and that after they knew that unless they obtained assistance and aid the said raft would be lost, to have secured sufficient aid and sufficient assistance and sufficient tugs to have held said raft and thereby [39] saved the same, and to have towed the same to sea, for there were sufficient sea-going tugs then and there available and could have obtained by the exercise of ordinary care in ample time to have protected and saved said raft and towed the same to sea, and that because of the fact that said petitioner, through its said masters and officers of said tugs, failed and neglected to secure such aid, the said raft became a total loss, save and excepting that after said raft became lost, the same broke and *and* a number of the piling and spars drifted ashore and this claimant saved all the said piling that could possibly be saved and realized therefrom the sum of Nineteen Hundred Eighty-five Dollars and Thirty-seven Cents (\$1985.37), which was and is a fair and reasonable value of all piling and spars saved after deducting therefrom the reasonable expenses in saving the same.

Claimant therefore avers that by reason of the failure of the petitioner to perform its said contract to safely tow said raft from the port of Astoria in Oregon, to the port of San Francisco, in California, and the loss of the said raft in the manner aforesaid, this claimant became and was damaged in the sum of One Hundred Ten Thousand Nine Hundred Eighty-three Dollars and Thirteen Cents (\$110,983.13),

whether the same be made up of interest or any damage of value at any time discovered.

WHEREFORE, by reason of the premises, claimant demands judgment against said petitioner in the sum of One Hundred Ten Thousand Nine Hundred Eighty-three Dollars Thirteen Cents, together with the costs and disbursements of this action.

WILLIAM DENMAN,  
W. S. BURNETT,

Proctors for Hammond Lumber Company, Claimant. [40]

State of California,  
City and County of San Francisco,—ss.

I, W. S. Burnett, being duly sworn, depose and say that I am the Vice-President of the Hammond Lumber Company, and as such officer I am authorized to make this verification in its behalf; that the allegations contained in the foregoing claim are true, as I verily believe.

W. S. BURNETT.

Subscribed and sworn to before me this 30th day of October, 1916.

[Seal] WM. D. PAGE,  
Notary Public in and for the City and County of San Francisco, State of California.

Filed November 1, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 1st day of November, 1916, there was duly filed in said court an Answer of Hammond Lumber Company, in words and figures as follows, to wit: [42]

*In the District Court of the United States for the District of Oregon.*

No. —.

'In the Matter of the Petition of SHIOPWNERS AND MERCHANTS TUGBOAT COMPANY, a Corporation, Owners of the Steam Tugs "DAUNTELESS" and "HERCULES," for Limitation of Liability.

**Answer to Petition and Affidavit for Dismissal of Proceeding to Limit Liability.**

The answer of Hammond Lumber Company, a corporation, claimant herein, to the petition for limitation of liability, respectfully alleges, admits and denies as follows:

I.

Claimant alleges that this is an equitable proceeding and that the powers of this Court are those of any court of equitable jurisdiction so far as they may effectuate the purposes of the legislation to limit liability. That the relief herein sought to be obtained, i. e., the enjoining of the State Court from proceeding with claimant's action at law pending in the Circuit Court of the State of Oregon for Clatsop County, should not in any event be granted to petitioner, unless presenting its petition with clean

hands. Claimant alleges that the facts are, and that petitioner's hands are not clean in respect thereto, as follows:

That petitioner is here seeking to obtain a limitation of liability on the theory that claimant's claim, alleged by petitioner [43] to include interest from September 9, 1911, to the filing of the petition herein, is in excess of the alleged (but not appraised) value of the fund of One Hundred and Fifteen Thousand Dollars (\$115,000) herein, without interest from the date of disaster;

That, although seeking and obtaining from this court an injunction against claimant on a petition based on this theory, it failed to disclose to the court that, at the time of filing its petition and obtaining the said injunction, there was pending in the District Court of the United States, for the Northern District of California, a limitation proceeding brought by petitioner, for its liability for the loss of the same log raft, in which the appraisement of said two tugs of petitioner and the fund for limitation, which fund consisted of two stipulations, one for each of said tugs, had been adjudicated between petitioner and claimant as at One Hundred and Fifteen Thousand Dollars (\$115,000), and interest at legal rate from September 9, 1911, and that at the time of filing the petition herein, the fund in said limitation proceeding pending in California amounted, with interest, to more than petitioner's said claim with said alleged interest.

That the fund in said pending California proceeding exceeds the amount of claim, as said amount is

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alleged herein by petitioner; that the said two stipulations, including said interest, were prepared and presented by petitioner and the approval of the Judge of said court to said bonds, and interest, was obtained by petitioner and, in pursuance of the order of said court, that said bonds included such interest; that said order of said District Court of California in said limitation proceeding pending there, so fixing said amount of said fund, was by it duly given and made on or about the 29th day of March, 1912, and that the orders approving said bonds were duly given and made March 30, 1912; that petitioner at no time [44] excepted to such order, and that thereafter said orders became final as between petitioner and claimant, by a final decree entered in said proceeding, dismissing the petition as to claimant, but otherwise retaining jurisdiction of said proceeding; that thereafter petitioner did appeal from said decree to the Circuit Court of Appeals, and that said decree was affirmed by the Circuit Court of Appeals of this circuit and thereby said appraisement and the orders and said adjudication of said fund became final as between the parties hereto.

That the practice in said Northern District of California is to allow interest on the fund in limitation proceedings from the date of the disaster from which the proceeding arises.

That if petitioner had set up the cause of action for limitation against claimant as now pleaded here in said pending proceeding in California, the said District Court for the Northern District of California would have been obliged to dismiss said pro-

ceeding as to claimant, because the said fund then exceeded the claim of claimant, including the interest thereon, as said claim is described by petitioner in the petition on file herein.

That petitioner, though well knowing all these facts, and, as claimant believes, merely to evade the said appraisement and said final adjudication of said fund in said District Court of the United States for the Northern District of California, did fail to represent to this court in said petition said facts, and did so conceal the same from this court, and did obtain the injunction herein on such concealment of facts; that such failure to disclose occurred at an *ex parte* hearing, where the Court was compelled to rely on petitioner for a full and candid disclosure by petitioner's pleadings and affidavits of all the facts affecting such right to an injunction. [45]

That said injunction was not only addressed to claimant, a private corporation, but also to the said Circuit Court of the sovereign State of Oregon for Clatsop County, and that by such failure to disclose such facts, said Circuit Court of said sovereign State has had its hands stayed and has been prevented from exercising its proper functions.

That the purpose and motive of such failure to disclose such facts was, as claimant believes, to obtain from this court a stipulation for the fund herein, with interest from the date of its filing, to wit, July 21, 1916, and then to assert that claimant's claim, with interest from September 9, 1911, was in excess of such fund herein with interest from said July 21, 1916.

That a further effect of the filing and prosecuting of these proceedings in this court is and will be to save to the petitioner the use of the moneys that may be recovered in said Circuit Court by claimant, if there successful, without interest, if petitioner succeeds in establishing the rule contended for by it, to wit, that no interest on the damages to claimant for loss of said raft be allowed; that already petitioner has prevented the prosecution of said action in said State Court for three years and a half by said proceedings in said Northern District Court of California held to have been brought improperly against petitioner.

That in said limitation proceeding in the Northern District of California it was, by the decree of said Court duly given and made and thereafter by the decree of the Circuit Court of Appeals for the Ninth Circuit affirmed, reported in 218 Federal Reporter, 161 at 165, duly adjudicated by and between petitioner and this claimant, that petitioner had no cause of action against claimant by reason of the existence of *several claims* arising from said disaster and loss of said log raft; that the fact as to such [46] adjudication nowhere appears in the petition or affidavits filed herein.

## II.

Admits that the allegations of Articles I and II of said petition are true.

## III.

Admits the allegations of the first paragraph of Article III, save as to the allegation therein that the master of the said tug "Dauntless" was unable

to secure the services of a bar tug to assist him with said raft out of the Columbia river and across the bar at the entrance thereof, as to which allegation and facts it is ignorant, wherefore it calls for proof thereof.

Further answering the said first paragraph of Article III, claimant alleges that the petitioner received the said log raft pursuant to a contract entered into between petitioner and claimant on the 30th day of August, 1911, whereby petitioner agreed to and with claimant, in consideration of the sum of Twenty-two Hundred and Fifty Dollars (\$2,250) agreed by claimant to be paid to petitioner upon the completion of the said towage, to safely tow for the claimant the said raft of piling and spars from Flavel, in the port of Astoria, in Oregon, to the port of San Francisco, in California; that the said raft when completed on the said date and at the time it became a total loss, contained five hundred and ninety-two thousand, four hundred and ninety-nine (592,499) lineal feet of piling and spars, and the said piling and spars were of the reasonable value of Ninety-eight Thousand, Nine Hundred and Sixty-nine and 50/100 Dollars (\$98,969.50); that the said raft as completed, including the piling and spars and the chains, wire cable, shackles, turn buckles and equipment used upon [47] and in the same to complete the said log raft for ocean towage was at the said time of the said loss of the full and reasonable value of One Hundred and Twelve Thousand, Nine Hundred and Sixty-eight and 50/100 Dollars (\$112,968.50).

Answering the second paragraph of Article III, denies that, notwithstanding the said conditions, the masters and crews of said tugs exerted every effort to save the said log raft and to tow the same to sea, and that, or that, despite all the efforts so put forth, said raft was gradually turned and swept broadside against the sea and swells until the after end of said raft tailed off toward the breakers on Peacock Spit, and in that behalf alleges that the swells encountered abreast of Channel Buoy No. 4 were observable to any competent mariner for a long time prior thereto, and that at the time that petitioner reached said Channel Buoy No. 4 it well knew said raft was doomed to destruction if it continued on said voyage, and that in spite thereof said tugs continued to pull upon said raft; denies that the said tugs continued, or at all, to put forth efficient or any proper efforts to save the said raft until after it had passed the black buoy known as Buoy No. 1, or at all; denies that suddenly, without warning, or impelled and irresistibly controlled by the said high seas, swells and currents pertaining thereto, or any of them, said raft pulled the towing hawser off the towing machine of the said tug "Dauntless," and in that behalf alleges that the combined strain of the power of the two tugs upon the towing machine of the after tug in the observed conditions between Buoy No. 4 and Buoy No. 1 would have inevitably caused said cable to pull off the towing machine of the after tug; that though well knowing that the said log raft would be doomed to destruction in the event that they continued on their voyage from Buoy No. 4 to Buoy No.

1, a distance of over [48] two miles, they did so continue; that the petitioner was grossly negligent in the management of the said tugs and in the equipment and arrangement thereof and in the choice of a route down the said river and across the said bar on the voyage prior to the wrecking and loss of said raft more fully and particularly described in the claim on file herein; that prior to and after the separation of said tugs from said log raft, petitioner had ample time and opportunity to secure said raft and tow the same safely to San Francisco, but carelessly and negligently refused to do so, and did not so do and abandoned the same, and the same became a loss as aforesaid, although abundant additional towing power and assistance could have been procured from other tugs and vessels in said vicinity to furnish the necessary power to save the said raft and tow it across the said bar and perform the said contract, but that petitioner did neglect to procure for itself the said assistance, as more particularly alleged in the claim on file herein.

#### IV.

Denies that during all or any of the aforesaid times of towage of the aforesaid raft, said tugs were staunch, able and seaworthy vessels for the towage of said log raft, or that they were at such times fully or properly manned, equipped, officered, supplied and appareled, or any of them, or were well and sufficiently or sufficiently fitted and supplied, or supplied with suitable boilers, machinery, towing machines, lines, hawsers, boats, tackle, apparel, appliances and stores, or any of them, and that, or that,

all the same, or any of the same, were in good order and sufficient, or either of them, for the business and voyage, or either of them, on which they were then engaged or employed; that as to the presence of an officer of petitioner on said tugs, or [49] either of them, and as to the entrusting of the said tugs, and as to the experience of the navigators thereof, claimant is ignorant, wherefore it calls for proof of the same, if the same be pertinent; denies that they were competent at all and in all respects, or in any respect qualified for the work so entrusted to them.

#### V.

Answering Article V, claimant denies that the damages and injuries done, occasioned and incurred upon the said voyages of the said tugs were done, occasioned and incurred, or any of them, without the consent or design or neglect of petitioner, and as to the allegation that said damages and injury were without that privity or knowledge of petitioner, alleges that it is ignorant of the same, wherefore it calls for proof thereof, if the same be pertinent.

#### VI.

Answering Article VIII of said petition, claimant alleges that the order approving the report of the Honorable James P. Brown, United States Commissioner, appraising the value of the said two tugs, etc., is not fully or completely described therein (and refers to the matters set forth in Article I of this answer), in this, that the said order, entered the said 29th day of March, 1912, did contain the following clause:

“And be it further ordered that the said petitioner

file with this Court undertakings, with good and sufficient surety, in the respective sums of Forty-five Thousand (45,000) Dollars and Seventy Thousand (70,000) Dollars, with interest thereon from the 9th day of September, 1911, respectively conditioned for the payment into this court by said petitioner of the value of said tug 'Dauntless' and the value of said tug 'Hercules' as fixed by the report of the appraisers, heretofore filed and approved herein, [50] whenever the same may be ordered by this court.

Entered this 29th day of March, 1912.

E. S. FARRINGTON,

Judge."

That thereafter there was filed in the said limitation proceeding in the Northern District of California, stipulations required by said order, providing therein interest on the respective values of the said tugs at legal rate, from the 9th day of September, 1911; that the said legal rate is seven (7) per cent per annum, and that petitioner did obtain, and the said Court did make its orders approving the stipulations of petitioner, so containing the said provision for interest from September 9, 1911; that thereafter the said District Court did issue its order that upon filing the said stipulations so containing said interest, process should be issued in the said proceeding to limit liability; and that thereafter process was issued and served upon any and all claimants against said fund; that thereafter, due time having elapsed after the serving of said process, all of the claimants, if any there were other than Hammond Lumber Company, were found in default and an order enter-

52 *Shipowners and Merchants Tugboat Company*  
ing their default was by the said court duly given  
and made, and that the said limitation proceeding,  
with the said other claimants so defaulted, was pend-  
ing at the time of the filing of the petition in the  
proceeding in this United States District Court for  
the District of Oregon.

## VII.

Answering Article IX of said petition, claimant  
denies that the said second amended complaint filed  
by Hammond Lumber Company contained allega-  
tions on its behalf to the effect that, measured by the  
market price of piling and spars in the city of San  
Francisco, in the month of September, 1911, the said  
raft and [51] its paraphernalia were worth a sum  
in excess of One Hundred and Ten Thousand, Nine  
Hundred and Eighty-three and 13/100 Dollars  
(\$110,983.13), for which judgment was demanded,  
and in that behalf alleges that it was in said second  
amended complaint, in said Circuit Court of Clatsop  
County, alleged as follows:

“That said raft when completed on said date and  
at the time it became a total loss as hereinafter  
stated, contained 592,499 lineal feet of piling and  
spars, and the piling and spars in said raft were of  
the reasonable value of \$98,969.50. That said raft  
as completed, including the piling and spars and  
chains, wire cables, shackles, turn buckles, and  
equipment, was at said time of the full and reason-  
able value of \$112,968.50. \* \* \*

“This plaintiff therefore avers that by reason of  
the failure of the defendant to perform its said  
contract to safely tow said raft from the port of Astoria

in Oregon, to the port of San Francisco, in the State of California, and the loss of said raft in the manner as aforesaid, this plaintiff became and was damaged in the full sum of \$112,969.50, no part of which has been paid, excepting defendant is entitled to a credit of \$1985.37, proceeds received from portions saved.

"Wherefore, by reason of the premises, plaintiff demands judgment against the defendant for the sum of \$110,983.13, together with the costs and disbursements of this action."

That nowhere in said suit in said Circuit Court of Clatsop County was any claim for interest made, other than in the statement in the brief quoted in Article IX of the petition, nor any amendment of the pleadings therein to support the suggestion of the said brief; admits that if said suggestion had been adopted and an amendment filed to permit its adoption, the claim of Hammond Lumber Company [52] would have been in excess of \$140,000.00, but that the said claim would have been less than the fund of One Hundred and Fifteen Thousand Dollars (\$115,000) plus interest at seven (7) per cent per annum (or six per cent per annum) from September 9, 1911, as provided for by petitioner in its stipulations in the said proceeding in the United States District Court for the Northern District of California.

### VIII.

Answering Article X of said petition, claimant admits that the sum of One Hundred and Forty Thousand Dollars (\$140,000), thus made up of interest from the time of the disaster in question would exceed the value of the interest of petitioner in its

said tugs as the same existed at the close of their respective voyages upon which the said raft was lost, if computed without interest; but the amount of the said claim as existing at the time of the disaster at all times was less and has never been claimed to be larger than the value of the interest of petitioner in the said tugs at said time.

#### IX.

Answering Article XI of said petition, claimant avers that said offer of stipulation is insufficient in this, that it does not offer a stipulation conditioned for the payment into court of the value of the tugs "Dauntless" and "Hercules," plus interest from September 9, 1911, the date of the disaster.

#### X.

Answering Article XII of said petition, claimant denies that the injury, loss and damage therein set forth was not caused, occasioned and incurred by any act or default of petitioner, and in that behalf avers that it was due to the acts and default of petitioner as hereinabove set forth and more fully set forth in the claim on file herein; [53]

Answering the next thirteen lines of said petition, claimant repeats the defenses hereinbefore set forth; that the period of time at which said raft was taken over was not the proper period of time to bring said raft into said swells, in this, that the heavy ebb tide increased the force of the said swells and decreased the likelihood of the turning out of the same in the event that conditions at the bar should not warrant the completion of the passage thereof; denies that the said swells and seas could not have been foreseen

and were not, or were not foreseen by the officers or crew, or either of them, of said tugs; alleges that it is ignorant as to the investigation and advice as to weather conditions prior to the beginning of said towage, wherefore it calls for proof of the same, if the same be pertinent; that said weather conditions were not unusual on said bar at said season of the year; that if the incoming seas and swells made it impossible to control the navigation of the raft, this was a matter of which petitioner had knowledge; denies that the conditions aforesaid were those which could not have been foreseen and which petitioner could not protect against; denies that notwithstanding said conditions, petitioner's tugs put forth every effort to save the said raft, and that notwithstanding all the efforts of said tugs, and notwithstanding the efficient and careful navigation of the tugs, the raft was gradually turned and carried broadside against the sea and swells until the after end of said raft tailed off toward the breakers on Peacock Spit; denies that said tugs continued to put forth efficient efforts to pull upon said raft until after the raft had passed the black buoy; denies that suddenly and without warning the raft pulled the towing hawser off the towing machine on said "Dauntless," and in that behalf alleges that there was abundant warning that such was likely to occur; denies that said tugs "Dauntless" and "Hercules" were [54] fully equipped with large and powerful towing machines; denies that they were in every respect seaworthy in hull and machinery, and that, or that, said towing machines were in every part in

a thorough efficient state; denies that said tugs were manned with a full complement of experienced officers and crew and were, or were commanded by competent masters of long experience in towing rafts, and who were, or who were, in every respect familiar with the conditions of the Columbia river and bar, and the channels thereof, and the condition of weather, sea, tides and currents reasonably to be apprehended in towing said raft to sea; denies that the hawser with which said tug "Dauntless" was made fast to said raft was made of steel and was in every respect properly fastened to said towing machine, or at all, at the time said raft broke away from said tug; denies that said raft was large and unwieldy and that by reason of its size and construction was unmanageable in the seaway, with the result that when caught by the ebbing tide and currents and heavy seas, said tugs, despite their size and power, were unable to keep said raft within the channel and from drifting to the northerly side thereof and upon Peacock Spit, and alleges that if such was the fact, it was well known to petitioner at all times; denies that owing to the size and character of said raft it was impossible for said tugs to turn said raft around and return with it back up the river against the ebbing tide, and alleges that, even if such were the case, it was the duty of the tugs to obtain assistance for that purpose; that said assistance was available to the tugs at said time; denies that said Hammond Lumber Company well knew that the season was growing late to make a tow of such a character and well knew the dangers of the

seas then likely to be encountered at the entrance of said river, and denies that notwithstanding the knowledge so possessed, or at all, said Hammond Lumber Company assumed the risk [55] and consented, or consented that the rafts should be towed, on the 9th day of September, 1911, by the said tugs "Dauntless" and "Hercules," notwithstanding the dangerous navigation incident to said voyage.

## XI.

Answering Article XIII of said petition, claimant denies that the loss of said raft was in no respect due to any unseaworthiness or any inefficiency on the part of said tugs, their machinery or equipment, or to any unskillfulness or negligence on the part of the masters, officers, or crews of said tugs, or any errors in navigation thereof, and in that behalf alleges that the loss of said rafts was due to unseaworthiness and inefficiency on the part of said tugs, their machinery and equipment, and to unskillfulness and negligence on the part of the masters, officers, and crew of said tugs and to errors in navigation thereof; denies that the loss was entirely due, or at all due, to perils of the sea or to the inherent risks and dangers of the enterprise or to the unwieldy character of said raft, or to the manner in which said raft was constructed, or to the size, weight and length of any of them, of the towing chains, or the manner in which they were made up and fastened to said raft by said Hammond Lumber Company.

## XII.

Answering Article XIV of said petition, claimant

denies that all and singular the premises are true, save as hereinabove admitted, and denies that the same are within the maritime jurisdiction of this Honorable Court. [56]

WHEREFORE, your claimant prays that the petition herein be dismissed, and that claimant be hence dismissed with its costs.

WILLIAM DENMAN,  
W. S. BURNETT,

Proctors for Hammond Lumber Company.

State of California,

City and County of San Francisco,—ss.

I, W. S. Burnett, being duly sworn, depose and say that I am the vice-president of the Hammond Lumber Company and as such officer I am authorized to make this verification in its behalf; that the allegations contained in the foregoing answer to petition and affidavit for dismissal of proceeding to limit liability are true, as I verily believe.

W. S. BURNETT.

Subscribed and sworn to before me this 30th day of October, 1916.

[Seal] WM. D. PAGE,  
Notary Public in and for the City and County of San Francisco, State of California.

Filed November 1, 1916. G. H. Marsh, Clerk.  
[57]

And afterwards, to wit, on the 20th day of July, 1917, there was duly filed in said court, a Motion to Dissolve Injunction or to Dismiss Petition, in words and figures as follows, to wit:

[58]

*In the District Court of the United States for the District of Oregon.*

No. 7220.

**In the Matter of the Petition of SHIOPWNERS & MERCHANTS TUGBOAT COMPANY, Owners of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.**

**Notice of Motion of Hammond Lumber Company, Sole Claimant, for Dissolution of Injunction Heretofore Issued Herein Against It and the Circuit Court of Clatsop County, State of Oregon, or, in the Alternative, for Dismissal of Petition for Limitation Herein as to Said Hammond Lumber Company, or In Toto.**

To the Petitioner, and Its Counsel, Ira A. Campbell, Esq., Wallace McCamant, Esq., E. B. Tongue, Esq., and Messrs. Snow, McCamant & Bronaugh:

You and each of you will please take notice that on Monday, the 23d day of July, 1917, at the court-room of said Court in the Federal Building, Portland, Oregon, upon the opening of Court on said day, or as soon thereafter as counsel may be heard, Ham-

mond Lumber Company, sole claimant herein, will move the said Court for the dissolution of injunction heretofore issued herein against it and the Circuit Court of Clatsop County, State of Oregon, or, in the alternative, for dismissal of petition for limitation herein as to said Hammond Lumber Company, or *in toto*, upon the following grounds, to wit:

### I.

That the record herein shows that there is but one claimant herein, Hammond Lumber Company, a corporation, and that the time [59] for the filing of claims herein has long since elapsed and that the petition herein sets forth but one claim for loss, damage or injury, arising from the acts described in said petition, to wit, that certain suit filed by Hammond Lumber Company and tried in the Circuit Court for Clatsop County, State of Oregon, for the recovery of damages for the loss of the log raft described in said petition and does not suggest the possibility of any other claim, and that said suit is a suit to recover the sum of \$110,983.13, and that Hammond Lumber Company has never at any time claimed or demanded any sum in excess thereof.

### II.

That the petitioner herein has enjoined the prosecution of said suit in Clatsop County and that claimant, Hammond Lumber Company, has filed herein its claim for the said sum of \$110,983.13.

### III.

That it has been adjudicated between petitioner and Hammond Lumber Company and is a matter of

*res adjudicata* between petitioner and Hammond Lumber Company, by virtue of a decree of the Circuit Court of Appeals for the Ninth Circuit in the proceeding entitled "Shipowners & Merchants Tug-boat Company vs. Hammond Lumber Company," Numbered 2388 in the records of said Court, and reported in 218 Federal Reporter, pages 161, 165, and it is the law that both the tugs "Dauntless" and "Hercules," referred to in said petition must be surrendered as a condition precedent to entitle petitioner to maintain any proceeding to limit its liability under the Revised Statutes of the United States in that behalf enacted, and that upon an *ex parte* appraisement of said tugs, without notice to Hammond Lumber Company, or knowledge on its part, and without opportunity to participate therein, said tugs have been appraised herein for an amount greatly in excess of the claim of Hammond Lumber Company, [60] to wit: in the sum of \$115,000.00; that by reason of the fact that there is but one claim on file herein and the time for the filing of other claims has expired, and if any such there be they are in default, and that said claim on file herein is for a less amount than the stipulation for the value of said tugs as so appraised, and their freight pending, this Court should make such order or decree herein as will permit the said Circuit Court of Clatsop County to proceed to a final adjudication of the said suit pending therein.

#### IV.

Said motion will be made upon the further ground that no claim has been filed herein other than the

said claim of Hammond Lumber Company and that the time within which any such other claim might or could be filed has long since elapsed, and it appears that the claim of Hammond Lumber Company as of the time of the loss of the said log raft in said petition pleaded was less than the value of said two tugs at said time.

#### V.

Said motion will be made upon the further ground that it appears that at the time of the institution of this proceeding there was then pending a proceeding for limitation of liability in the U. S. District Court for the Northern District of California, involving the loss of the same log raft which the Court last mentioned, with its equity powers, could have considered and to which Court petitioner could have and should have presented the alleged new facts as to the character of the claimant's claim.

#### VI.

Said motion will be made upon the further ground that in said limitation proceeding pending in the United States District Court [61] for the Northern District of California and by virtue of the decree therein affirmed by the said United States Circuit Court of Appeals for the Ninth Circuit, it was a matter of *res adjudicata* between petitioner and Hammond Lumber Company that the fund in limitation constituted and was the sum of \$115,000.00, with legal interest accruing thereon from the 9th day of September, 1911.

#### VII.

Said motion will be made upon the further ground

that while Hammond Lumber Company insists that it has never at any time in said suit in Clatsop County, in its said brief filed therein, or otherwise, demanded or claimed, or intended to demand or claim, the recovery of any sum in excess of \$110,983.13, nevertheless, that said brief, copy of which, so far as it relates to said matter is attached as Exhibit "E" to the affidavit of A. B. Hammond, L. C. Stewart, H. F. Faull, E. A. Hinch and W. S. Burnett, attached hereto, marked Exhibit 1 and made a part hereof, can be regarded at most as ambiguous or uncertain as to whether it imports a demand in excess of said sum last mentioned, and that Hammond Lumber Company does hereby, for the purpose of clearing up such, if any, ambiguity or uncertainty, declare the total amount of its said claim against Shipowners & Merchants Tugboat Company to be and is limited to the said amount of \$110,983.13 and no more, and that said sum is and ever has been the total amount of its claim against petitioner by virtue of the matters and things complained of in the said second amended complaint filed in said suit in Clatsop County, and by virtue of its claim filed herein, and that it has never made any claim by virtue of such matters in any sum in excess thereof, and that nothing contained in any pleading or brief filed by Hammond Lumber Company in said suit in Clatsop County, or elsewhere, can be construed, or was intended to be construed, to make a claim in excess of the above sum last mentioned. [62]

## VIII.

Said motion will be made upon the further ground,

that at the suggestion of petitioner herein, Hammond Lumber Company and petitioner stipulated in open Court, in the said action in the said Circuit Court of Clatsop County that the trial of said action before a jury should be waived and that such trial should be before and by the Court without the intervention of a jury and that in pursuance of such stipulation and waiver so made it was ordered by said Court that the cause should be tried and said cause was in fact tried by the Court without the intervention of a jury and that by reason of the premises said petitioner has voluntarily submitted itself in relation to the matters arising or to arise in said action to said Circuit Court for decision and adjudication and has waived its right, if any it otherwise had, to require said Hammond Lumber Company to litigate its said claim in this or any other proceeding than the said action in Clatsop County.

## IX.

That in making said motion Hammond Lumber Company will rely upon all pleadings, papers, documents, entries and filings in the record of this proceeding to limit liability and upon the opinion and decree of the Circuit Court of Appeals for the Ninth Circuit, rendered and made in the said cause, entitled "Shipowners & Merchants Tugboat Company vs. Hammond Lumber Company," numbered 2388 in the docket of said Court and reported in 218 Federal Reporter, p. 161 et seq., and upon the affidavit of A. B. Hammond, L. C. Stewart, H. F. Faull, E. A. Hinch and W. S. Burnett, attached hereto and made a part hereof, and marked Exhibit 1.

WHEREFORE, said Hammond Lumber Company moves for dissolution of injunction heretofore issued herein against it and the Circuit [63] Court of Clatsop County, State of Oregon, or, in the alternative, for dismissal of petition for limitation herein as to said Hammond Lumber Company, or *in toto*, and that it recover its costs against petitioner, and for such other or further relief as may be meet and agreeable to equity.

W. S. BURNETT,  
G. C. FULTON,

Proctors for Claimant, Hammond Lumber Company.

[64]

**Exhibit No. 1—Affidavit of A. B. Hammond et al.**

**EXHIBIT 1.**

*In the District Court of the United States, for the  
District of Oregon.*

No. 7220.

In the Matter of the Petition of SHIOPWNERS & MERCHANTS TUGBOAT COMPANY, Owners of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

AFFIDAVIT OF A. B. HAMMOND, L. C. STEWART, H. F. FAULL, W. S. BURNETT AND E. A. HINCH, TO BE USED ON MOTION FOR DISSOLUTION OF INJUNCTION HERETOFORE ISSUED HEREIN AGAINST IT AND THE CIRCUIT COURT OF CLATSOP COUNTY, STATE OF OREGON, OR, IN

THE ALTERNATIVE, FOR DISMISSAL OF  
PETITION FOR LIMITATION HEREIN AS  
TO SAID HAMMOND LUMBER COMPANY,  
OR IN TOTO.

State of California,

City and County of San Francisco,—ss.

A. B. Hammond, L. C. Stewart, H. F. Faull, W. S. Burnett and E. A. Hinch, being first duly and severally sworn, depose and say: That Hammond Lumber Company, claimant herein, was incorporated under the General Incorporation Act of the State of New Jersey, entitled "An Act Concerning Corporations (Revision of 1896)," Chapter 185, Laws of 1896, and acts amendatory thereof; and that upon proceedings duly taken in pursuance of said act, said corporation became and was dissolved on the 15th day of June, 1917; that at the time of such dissolution, in pursuance of said act and under the Articles of Incorporation of said company and its by-laws, the board of directors, of said Hammond Lumber Company consisted of five members and affiants constituted and were at said time the directors thereof; that [65] as such directors at the time of said dissolution under the said act then and now in force and in that behalf provided, affiants thereupon became, were and still are the trustees in dissolution of said corporation, and that under and in pursuance of said act the corporate existence of said Hammond Lumber Company has been and is continued for the purpose of conducting litigation both for and against it, either in the name of said corporation, or in the name of said trustees, and for the purpose of wind-

ing up its affairs, and disposing of its property, and that affiants, as such trustees in dissolution are the sole agents and representatives of said corporation for any and all such purposes, and are authorized to make this affidavit on behalf of said corporation to be used upon this motion.

I.

That in the proceeding for limitation of liability instituted in the United States District Court for the Northern District of California by Shipowners & Merchants Tugboat Company, referred to in the petition for like limitation now pending in the United States District Court for the District of Oregon, an Interlocutory Decree of Default was made and entered therein; that a copy of said Interlocutory Decree of Default is attached hereto, made a part hereof and marked Exhibit "A."

That a copy of the opinion of Hon. M. T. Dooling, Judge of the said United States District Court for the Northern District of California, and a copy of the order entered in pursuance thereof, dismissing the said proceeding in said Court as to said Hammond Lumber Company and otherwise retaining jurisdiction of said proceeding is attached hereto, marked respectively Exhibit "B" and "C," and each is made a part hereof. [66]

That said proceeding in said United States District Court for the Northern District of California remained pending and undetermined and no hearing was ever had or held as respects the defaulted defendants, or otherwise, and was pending at the time of the institution of the said proceeding in the

United States District Court for the District of Oregon and continued to remain pending and within the jurisdiction of the said United States District Court for the Northern District of California until after the institution of said proceeding in said United States District Court for the District of Oregon, to wit, until August 2, 1916, at which time said proceeding was dismissed, or attempted to be dismissed by said Shipowners & Merchants Tugboat Company, and that a copy of the so-called dismissal and order made thereon is attached hereto, marked Exhibit "D," and made a part hereof.

## II.

That the following is a true and complete statement concerning the filing of briefs in the said action pending in the Circuit Court of Clatsop County upon and after the submission of said cause, to wit: That upon the conclusion of the trial of said action and after oral argument had by each of the parties thereto, Shipowners & Merchants Tugboat Company sought and obtained leave of the Court to file a brief, which brief was thereafter filed, and thereafter Hammond Lumber Company filed a brief in reply, being the brief referred to in the petition for limitation of liability herein; that thereafter Shipowners & Merchants Tugboat Company sought and obtained from said Court leave to file yet another brief, which was in fact filed on or about July 19, 1916, and a copy thereof served upon the attorneys for Hammond Lumber Company; that said attorneys and said Hammond Lumber Company contemplated applying to said Court for leave to file a brief in

reply in accordance with the practice permitting the plaintiff to file the closing brief, but within three days after the service of the [67] brief last mentioned of Shipowners & Merchants Tugboat Company upon Hammond Lumber Company, to wit, on July 21, 1916, said petition for limitation herein was filed in said United States District Court for the District of Oregon, an *ex parte* appraisement of the said tugs "Dauntless" and "Hercules" was had, an undertaking filed and approved, and Hammond Lumber Company and the said Circuit Court of Clatsop County were enjoined by said United States District Court for the District of Oregon from further prosecuting said action in the said Circuit Court of Clatsop County, and that thereby said Hammond Lumber Company was deprived of the opportunity of clearing up and settling any ambiguity there might have been in its discussion of the measure of damages applicable in the case in its said brief referred to in the petition herein. That attached hereto, marked Exhibit "E" and made a part hereof, is a copy of the entire discussion under the caption "The Value of the Raft," contained in the said brief of Hammond Lumber Company upon the question of the measure of damages and the evidence adduced at the trial in support thereof and on the subject of interest, and which contains the context surrounding the isolated remark quoted therefrom in the petition for limitation of liability herein.

Further in this behalf affiants deny that Hammond Lumber Company has ever at any time in said action in Clatsop County, or in the said brief of Ham-

mond Lumber Company, or otherwise, or elsewhere, demanded or claimed, or intended to demand or claim, the recovery of any sum in excess of \$110,-983.13, and affiants do hereby affirm and declare that the total amount of the claim of Hammond Lumber Company against Shipowners & Merchants Tugboat Company to be and is hereby and has been limited to the said sum last mentioned and no other sum, by virtue of the matters and things complained of in the second amended complaint filed in said action in said Circuit Court of Clatsop County and by virtue of its claim filed herein and that it [68] has never made any claim by virtue of such matters in any sum in excess thereof and that nothing contained in any pleading or brief filed by Hammond Lumber Company in said action in said Circuit Court of Clatsop County, or elsewhere, can be construed, or was intended to be construed, to make a claim in excess of the said sum last mentioned.

### III.

That upon the calling of said action in said Circuit Court of Clatsop County for trial and just prior to the actual commencement of the trial thereof, Shipowners & Merchants Tugboat Company requested of the said Hammond Lumber Company that said action should be tried by the Court, without the intervention of a jury, to which said request said Hammond Lumber Company acceded, and that thereupon Hammond Lumber Company and said Shipowners & Merchants Tugboat Company stipulated in open court, in the said action last mentioned, that the trial of said action before a jury be waived,

and that such trial should be before and by the Court, without the intervention of a jury, and that in pursuance of such stipulation and waiver so made, it was ordered by said Court that the cause should be tried and said cause was in fact tried by the said Court without the intervention of a jury; that the Hon. J. A. Eakin was, during all of said time, the Judge of said Court and the Judge who presided at the trial of said action, and he has continued ever since to be and still is the Judge thereof.

And further affiants saith not.

A. B. HAMMOND.  
L. C. STEWART.  
H. A. FAULL.  
W. S. BURNETT.  
E. A. HINCH.

[Corporate Seal of Hammond Lumber Company.]

Subscribed and sworn to before me this 17th day of July, 1917.

[Notarial Seal] KATHRYN E. STONE,  
Notary Public in and for the City and County of  
San Francisco, State of California.

My commission expires March 1st, 1921. [69]

EXHIBIT "A."

*In the United States District Court for the Northern  
District of California, First Division.*

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of SHIOPWNERS &  
MERCHANTS TUGBOAT COMPANY, a  
Corporation, Owner of the Steam Tugs  
"DAUNTLESS" and "HERCULES," for  
Limitation of Liability.

**INTERLOCUTORY DECREE OF DEFAULT.**

It appearing to this Court that Shipowners & Merchants Tugboat Company, a corporation, petitioner herein, filed in this court on the 27th day of February, 1912, its petition for limitation of liability; and,

It further appearing that due appraisement, under order of this Court, has been made by the Hon. James P. Brown, appraising the value of the interest of said petitioner in the steam tugs "Dauntless" and "Hercules," their boilers, engines, boats, tackle, apparel, furniture and appurtenances, at the respective sums of Forty-five Thousand (45,000) Dollars and Seventy Thousand (70,000) Dollars, as the same were immediately after the close of their respective voyages mentioned in said petition; and,

It further appearing that the report of said commissioner was filed with this court on the 23d day of March, 1912, and thereafter approved by this Court on the 29th day of March, 1912; and,

It further appearing that stipulations, duly approved by this Court, have been filed herein on the 30th day of March, 1912, conditioned that the petitioner herein will pay into this Court whenever the same may be ordered either by this Court, or by the Appellate Court, in the event that an appeal intervenes, the [70] aforesaid appraised value of the interest of said petitioner in said steam tugs "Dauntless" and "Hercules," as the same were immediately after the close of their respective voyages mentioned in said petition, together with interest thereon from

the 9th day of September, 1911; and,

It further appearing that thereafter on the 2d day of April, 1912, a monition issued under order and seal of this court, and that the marshal for the Northern District of California, as commanded by said monition, cited all corporations, person or persons, claiming damages for any loss, damage or injury occurring or arising upon said voyages of said steam tugs "Dauntless" and "Hercules," leaving the port of Astoria, Oregon, on the 9th day of Seutember, 1911, and particularly the Hammond Lumber Company, a corporation, claiming damages for the loss of a raft of piling upon said voyages, to appear before said Court and make due proof of their respective claims before James P. Brown, Esq., United States Commissioner, at his office in the Postoffice Building, on the corner of Seventh and Mission Streets, in the city of San Francisco, on or before the 10th day of July, 1912, at 10 o'clock in the forenoon, by giving public notice of said monition, as ordered by this Court, by posting copies of said monition in three public places in the city and county of San Francisco, State of California, and by serving a copy of said monition upon said Hammond Lumber Company, a corporation, at its office, No. 260 California Street, city of San Francisco, State of California; and, that further public notice of said monition was given pursuant to order of this Court by publishing in the "Recorder," a newspaper of general circulation, printed and published daily (Sundays and legal holidays excepted), in the city and county of San Franeisco, State of California, a copy of said [71] monition once a

week until the return day fixed in said monition, to wit, the 10th day of July, 1912; and,

It further appearing that on the return day of said monition, to wit, on the 10th day of July, 1912, at the hour of 10 o'clock in the forenoon, the crier of this court made proclamation for all corporations, person or persons, claiming damages for any loss, damage, or injury occurring or arising upon the aforesaid voyages of the steam tugs "Dauntless" and "Hercules," leaving the port of Astoria, Oregon, on the 9th day of September, 1911, and particularly anyone claiming damages for the loss of a raft of piling upon said voyages, to come into court and make due proof of their said claims and answer the petition of the Shipowners & Merchants Tugboat Company, petitioner herein, for limitation of liability, under pain of being pronounced in contumacy and default and having said petition taken *pro confesso* against them; and,

It further appearing that no corporation, person or persons, other than the Hammond Lumber Company, appeared in response to said proclamation, and that thereupon, on motion of proctors for petitioner, an order was entered pronouncing in default all corporations, person or persons, save and except the said Hammond Lumber Company, who might have any claim for loss, damage or injury occurring or arising upon the aforesaid voyages of said steam tugs "Dauntless" and "Hercules"; and,

It further appearing from the report of James P. Brown, Esq., the United States Commissioner named in said monition, that no claims have been filed with

him as directed by said monition;

And the Court being fully advised in the premises;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the default of all persons and corporations save and except [72] the Hammond Lumber Company, having any claims against the Shipowners & Merchants Tugboat Company, petitioner herein, or said steam tugs "Dauntless" or "Hercules," for any loss, damage or injury occurring or arising upon those certain voyages of said steam tugs "Dauntless" and "Hercules," leaving the port of Astoria, Oregon, on September 9, 1911, and particularly of all persons and corporations, save and except the Hammond Lumber Company claiming damages for the loss of a raft of piling upon said voyages, be, and the same is, hereby entered.

Dated at San Francisco, this 12th day of July, 1912.

JOHN J. DE HAVEN,  
Judge.

[Endorsed]: Filed Jul. 12, 1912. Jas. P. Brown,  
Clerk. By M. T. Scott, Deputy Clerk. [73]

EXHIBIT "B."

*In the District Court of the United States, in and for  
the Northern District of California, First Division.*

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of the SHIOPWNERS  
& MERCHANTS TUGBOAT COMPANY,  
a Corporation, Owner of the Steam Tugs  
"DAUNTLESS" and "HERCULES," for  
Limitation of Liability.

OPINION.

IRA A. CAMPBELL, McCUTCHEON, OLNEY  
& WILLARD, Proctors for Petitioner.

DENMAN & ARNOLD, Proctors for Claimant.

The undisputed facts appearing thus far in this proceeding to limit liability are, briefly stated, as follows:

In August, 1911, the Hammond Lumber Company (hereinafter designated claimant) and the Shipowners & Merchants Tugboat Company (hereinafter designated petitioner), entered into a contract wherein the latter agreed, in consideration of the sum of \$2,250.00, to tow for the former a large raft of pilings and spars from Astoria to San Francisco. Pursuant to this contract, claimant delivered to petitioner in September, 1911, such raft at Flavel in the port of Astoria to be by petitioner towed to San Francisco. Petitioner for the purpose of towing said raft out of the Columbia River and across the bar thereof, made use of two of its tugs, the "Daunt-

less" and the "Hercules," in the following manner: The tug "Dauntless" was fastened to the raft with a long towing cable, one end of which was wound around the drum of the towing machinery on said "Dauntless" and the other end of which was fastened to the raft, and the tug "Hercules" was fastened to the tug "Dauntless" with a long towing [74] cable leading through the forward bitts of the "Dauntless" to the towing machine of the "Hercules." The two tugs thus in tandem started to sea with the raft, but whether because of the negligence of petitioner as alleged by claimant, or because of the perils of the sea, as claimed by petitioner, the line from the "Dauntless" to the raft parted and the raft became a total loss. Claimant in November, 1911, commenced an action against petitioner in the Circuit Court of the State of Oregon for Clatsop County for \$71,249.90, for the loss of said raft, alleging that such loss was due to the negligence of petitioner. This action is now, and was, before the filing of the stipulation hereinafter mentioned, at issue upon the amended complaint of claimant and petitioner's answer thereto. On February 27th, 1912, petitioner filed in this court its petition for limitation of liability, but praying that if such liability be found to exist it be limited to the value of the tug "Dauntless," yet also offering to deliver the tug "Hercules" in case it be found that this tug also is liable, and praying further that all claims arising against petitioner by reason of said voyage be heard and determined in this court; and that all other proceedings be stayed. Appraisement having been duly made of the two tugs

the value of the "Dauntless" was fixed at \$45,000.00, and of the "Hercules" at \$70,000, for which values a stipulation was filed by petitioner. No person other than claimant having made any claim herein, in due time, and on July 12th, 1912, an interlocutory decree of default against all persons other than claimant was duly entered. Claimant now moves the Court to dismiss the petition for limitation of liability as to it, and for leave to prosecute its action in the Oregon State Court, upon the grounds: 1. That there is only one claim made herein; and 2. That that claim is for much less [75] than the appraised value of the tugs "Dauntless" and "Hercules," and that for these reasons there is no occasion for limitation of liability, and no reason for depriving claimant of its common-law remedy of trial by jury. Petitioner resists the motion, insisting that as this court has rightly acquired jurisdiction of this proceeding and of claimant, it should retain it until the whole matter is disposed of, and insisting further that in no event can the tug "Hercules" be held liable; that as the value of the "Dauntless" is only \$45,000, while claimant seeks to recover \$71,249.90, petitioner's liability should be limited to said sum of \$45,000, and therefore this Court must retain and dispose of the whole question.

The statute providing for limitation of liability is designed for the protection of the shipowner, and the object of proceedings thereunder is to afford such protection by preventing recoveries in excess of the value of the vessel and freight pending, and distributing such value in proper proportions where there

are more claimants than one. Where there is but one claimant, however, and his claim is for much less than the amount to which the liability of the ship-owner may properly be limited, there is neither danger of recovery above such amount, nor necessity for distribution among a number of claimants. If the tug "Hercules" is equally liable with the tug "Dauntless" for the loss of the raft in question, we have the case here of a single claimant for an amount much less than that to which petitioner's liability may in any event be limited.

Both tugs being engaged in the same venture, at the time of the disaster, are equally liable, if there be liability at all, though the tug "Dauntless" was the only one attached directly to the raft.

The Columbia, 73 Fed. 237:

Thompson Towing Co. vs. McGregor, 207 Fed.

**212. [76]**

Under the peculiar circumstances of the present proceedings I am of the opinion that petitioner's protection does not require that this Court should further restrain claimant from prosecuting its action in the State Court, and that as to said claimant the proceedings should be dismissed. The same result might perhaps be attained by dissolving the restraining order in so far as it applies to claimant, but I am satisfied that as claimant has moved to dismiss, instead of for a dissolution of the restraining order, its motion should be granted. The proceeding as to claimant is, therefore, dismissed. The Court, however, will retain jurisdiction of the proceedings for

the protection of petitioner against any other possible claims.

January 10th, 1914.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Jan. 10, 1914. W. B. Maling,  
Clerk. By Francis Krull, Deputy Clerk. [77]

EXHIBIT "C."

*In the United States District Court, for the Northern  
District of California, First Division.*

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of the SHIOPWNERS  
& MERCHANTS TUGBOAT COMPANY,  
a Corporation, Owner of the Steam Tugs  
“DAUNTLESS” and “HERCULES,” for  
Limitation of Liability.

DECREE.

The motion of the Hammond Lumber Company, a corporation, to dismiss the petition herein, in so far as it applies to the Hammond Lumber Company, coming on duly to be heard, and it appearing that the claim of the Hammond Lumber Company is the only claim on file in this proceeding; and it further appearing that after due notice published and reserved, as required by law, a default has been entered herein against all persons, if any there be, entitled to file a claim in this proceeding; and it further appearing that the size of the fund for the payment of the sole claim herein filed, to wit, that of the Hammond Lum-

ber Company, exceeds the claim of the Hammond Lumber Company,—

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that the said petition be dismissed as to the said Hammond Lumber Company, claimant herein, and that said petitioner take nothing against said Hammond Lumber Company, by the said petition; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that said Hammond Lumber Company do have and recover its costs herein; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the above order and decree shall in no wise affect the rights of the petitioner here acquired, if any there be, against any other persons entitled to file claims herein, if any there be.

Dated, January 13th, 1914.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Jan. 13, 1914. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [78]

#### EXHIBIT "D."

*In the District Court of the United States, in and for  
the Northern District of California, First Divi-  
sion.*

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of the SHIOPWNERS  
& MERCHANTS TUGBOAT COMPANY, a  
Corporation, Owner of the Steam Tugs  
“DAUNTLESS” and “HERCULES,” for  
Limitation of Liability.

DISMISSAL OF PROCEEDINGS.

The petition heretofore filed herein, and the whole of said proceedings, is hereby dismissed, and the clerk of said court is hereby authorized and directed to enter said dismissal of record.

IRA A. CAMPBELL,

McCUTCHEON, OLNEY & WILLARD,

Proctors for Petitioner.

IT IS HEREBY ORDERED that said petition and said proceedings be and the same is hereby dismissed.

Dated: San Francisco, August 2d, 1916.

WM. W. MORROW,

Judge. [79]

EXHIBIT "E."

THE VALUE OF THE RAFT.

There should be little difficulty in determining the value of this raft. In fact, there is no controversy in regard to the market price of the piling and spars in San Francisco. Mr. Hammond (page 592) testified that the market value of these piling and spars in San Francisco, on the day they should have arrived, was as follows:

All 12 inch piling, 14 cents per lineal foot;

All 16 inch piling, 16 cents per lineal foot;

All 17 and 18 inch piling, 18 cents per lineal foot;

All spars, 50 cents per lineal foot.

Witness Charles H. Hoover (page 489), testifies from actual memoranda of the piling which went into this raft, from actual scale made by him, the raft was made up as follows:

- 5% 12 inch piling.
- 25% 16 inch piling.
- 40% 17 inch piling.
- 30% 18 inch piling.

As we figure it, the average value of all piling would be .173 cents per foot. In order that our figures may be checked up, and if incorrect, may be corrected, we herewith submit the method adopted in arriving at this amount, namely:

5% 12 inch piling at 14 cents per foot,	
equals (p. 592) .....	.007¢
25% 16 inch piling at 16 cents per foot,	
equals .....	.04¢
40% 17 inch piling at 18 cents per foot,	
equals .....	
30% 18 inch piling at 18 cents per foot,	
equals .....	.126¢

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Total average value in San Francisco .173¢ per foot.

Therefore, estimating the piling in the raft at .173¢ per foot, we have,

592,500 feet piling at .173¢ per foot....	\$102,502.50
1,232 feet spars, at 50¢ per foot (pg.	
592) .....	616.00
Value of chain, etc., equipment raft construction (Plff's. Ex. "L") .....	14,170.19

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(Pg. 496, 511 et seq. Pg. 232)

Value of raft in San Francisco, Cal....\$117,288.69

From this should be deducted the following:

Cost of breaking raft (pg. 593) \$1900.00

Cost of towage (pg. 3) 2250.00

Amount salved (pg. 541) 1985.47 6,135.47

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Total Loss to Plaintiff.....\$111,153.22

[80]

To this should be added interest from September 9, 1911, at 6 % per annum.

A little difficulty may be met with in determining the value of the raft at Astoria, owing to the fact there was practically no general fixed market value there. It seemed that no one was engaged in the business of handling piling there. Persons desiring piling generally made purchase thereof up the Columbia river, as best he could. The prevailing price for piling, however, was clearly shown to have been seven cents (7¢) per foot. This is the price fixed by Mr. Ayres, page 571, Evidence. This is the price not made up into the raft.

For spars, not made into the raft, this witness fixed the price at 15¢ per foot, page 572.

It cost the plaintiff to construct this raft, without taking into consideration costs of machinery and plant, or amount of money invested, a sum equal to one cent per lineal foot (pg. 577). The actual cost of the piling in the raft to plaintiff was, piling seven cents, and spars fifteen to thirty cents per lineal foot (pg. 580), plus towage charge to Astoria, amount to \$450.00.

We have, therefore, the following as the value of this raft at the port of Astoria, to wit:

592,500 lineal feet of piling at 8¢ per foot..	\$47,400.00
1,232 lineal feet of spars at 20¢ per foot..	246.40
Towage charge to Astoria.....	450.00
Value of chains, etc.....	14,170.19

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Value of raft at port of Astoria, September  
9, 1911 .....

.....\$62,266.59

From this should be deducted the value of piling salved, namely, \$1,985.47. This would leave the amount the plaintiff should recover on this theory of the law, the sum of \$60,279.04, with interest from September 9, 1911, at 6% per annum.

Filed July 20, 1917. G. H. Marsh, Clerk. [81]

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And afterwards, to wit, on the 10th day of September, 1917, there was duly filed in said court an Opinion on Exceptions and Motion in words and figures as follows, to wit: [82]

*In the District Court of the United States for the District of Oregon.*

In the Matter of the Petition of SHIOPWNERS & MERCHANTS TUGBOAT COMPANY, a Corporation, Owners of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

**Opinion on Exceptions and Motion for Limitation  
of Liability.**

Portland, Oregon, Monday, September 10, 1917.

Memorandum by R. S. BEAN, District Judge:

Objections to the consideration of the motion to dissolve the injunction and dismiss the proceedings will be overruled. The motion goes to the jurisdiction of the Court over the subject matter and was not waived by a general appearance.

The exceptions and the motion will be allowed and the petition dismissed.

(1) I am disposed to believe that the petitioner's remedy, if any, was by an application to the District Court of the Northern District of California, by supplemental petition or otherwise, to have the Hammond Lumber Company brought in and made a party to the limitation of liability proceedings therein pending. These proceedings had been instituted by the petitioner here and were still pending in that court at the time the petition was filed in this court. True the proceedings had been dismissed as to the Hammond Lumber Company on the ground that its claim, as then asserted, did not exceed the value of the tugs, but jurisdiction over the proceedings was retained, and it was, I think, within the power of that court to have caused the Hammond Lumber Company to be brought in if it subsequently [83] asserted a claim in excess of the fund, and that such was the petitioner's remedy, and not by the commencement of a new proceeding in this court.

(2) But however that may be, the claim as made by the Hammond Lumber Company in the State court does not exceed the fund. The amount of such claim is to be determined by the state of the pleadings and the amount claimed therein, and not by the estimates or assertions of counsel in an argument based on his construction of the testimony and the law, made in a brief filed after the case had been submitted. The action in the State court is to recover unliquidated damages and interest as such is not recoverable in this State on such a demand. (Sargent vs. American Bank & Trust Co., 80 Or. 16.)

Filed September 10, 1917. G. H. Marsh, Clerk.

[84]

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And afterwards, to wit, on Thursday, the 20th day of September, 1917, the same being the 69th Judicial day of the regular July term of said Court; present, the Honorable ROBERT S. BEAN, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [85]

*In the District Court of the United States for the District of Oregon.*

No. 7220.

In the Matter of the Petition of SHIOPWNERS  
& MERCHANTS TUGBOAT COMPANY,  
Owners of the Steam Tugs "DAUNTLESS"  
and "HERCULES," for Limitation of Li-  
ability.

**Decree of Dismissal of Petition.**

The exceptions to the petition herein and motion to dismiss said petition coming on duly to be heard, the said exceptions being sustained and the said motion being granted,—

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the said petition be, and the same is, hereby dismissed.

Dated, September 20th, 1917.

R. S. BEAN,  
Judge.

IT IS ORDERED that the injunction issued in the above-entitled proceedings be continued in force for 10 days to enable petitioner to perfect its appeal.

Sep. 21st, 1917.

R. S. BEAN,  
Judge.

Filed Sep. 20, 1917. G. H. Marsh, Clerk. [86]

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And afterwards, to wit, on the 29th day of September, 1917, there was duly filed in said court a Notice of Appeal, in words and figures as follows, to wit: [87]

*In the District Court of the United States for the District of Oregon.*

In the Matter of the Petition of SHIOPWNERS & MERCHANTS TUGBOAT COMPANY, a Corporation, Owners of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

**Notice of Appeal.**

To the Hammond Lumber Company, and to Messrs.

W. S. Burnett, William Denman and G. C. Fulton, Its Proctors:

You and each of you will take notice that Ship-owners and Merchants Tugboat Company, the petitioner in the above-entitled proceeding, hereby takes its appeal to the United States Circuit Court of Appeals for the Ninth District from the decree passed in the above-entitled court and cause September 20, 1917.

IRA A. CAMPBELL,

SNOW, BRONAUGH & THOMPSON,

Proctors for Petitioner.

Receipt of copy of the within notice of appeal is admitted at San Francisco, California, this 25th day of September, 1917.

W. S. BURNETT,

WILLIAM DENMAN,

Proctors for Hammond Lumber Company.

Filed Sep. 29, 1917. G. H. Marsh, Clerk. [88]

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And afterwards, to wit, on the 19th day of October, 1917, there was duly filed in said court, an Assignment of Errors, in words and figures as follows, to wit: [89]

*In the District Court of the United States for the  
District of Oregon.*

No. 7220.

In the Matter of the Petition of SHIOPWNERS & MERCHANTS TUGBOAT COMPANY, a Corporation, Owners of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

**Assignment of Errors.**

Now comes Shipowners and Merchants Tugboat Company, a corporation, petitioner and appellant herein, and says that in the record, opinion, decision and final decree in said cause there is manifest and material error, and appellant now makes and presents the following assignment of errors upon which it relies:

I.

The District Court erred in sustaining the exceptions of Hammond Lumber Company to the libel and petition of the Shipowners and Merchants Tugboat Company.

II.

The District Court erred in granting the motion of Hammond Lumber Company for the dismissal of said libel and petition of the Shipowners and Merchants Tugboat Company.

III.

The District Court erred in rendering the decree herein, of date the 20th day of September, 1917, dismissing the libel and petition of said Shipowners

and Merchants' Tugboat Company on file in said District Court. [90]

IV.

The District Court erred in holding and deciding that the remedy of appellant and petitioner, Shipowners and Merchant. Tugboat Company, was by an application to the Southern Division of the United States District Court for the Northern District of California, by supplemental petition or otherwise, to have the Hammond Lumber Company brought in and made a party to the limitation proceedings previously instituted therein by said Shipowners and Merchants Tugboat Company.

V.

The District Court erred in holding and deciding that the limitation proceedings instituted by the Shipowners and Merchants Tugboat Company in the District Court of the United States for the Northern District of California were pending in said last-named court at the time said Shipowners and Merchants Tugboat Company filed its said libel and petition to limit liability, if any, in the District Court of the United States for the District of Oregon.

VI.

The District Court erred in holding and deciding that the limitation proceedings instituted by the Shipowners and Merchants Tugboat Company in the District Court of the United States for the Northern District of California were pending as to Hammond Lumber Company in said last-named court at the time said Shipowners and Merchants

Tugboat Company filed its said libel and petition to limit liability, if any, in the District Court of the United States for the District of Oregon. [91]

### VII.

The District Court erred in holding and deciding that it was within the power of the District Court of the United States for the Northern District of California for the Southern Division to have caused the Hammond Lumber Company to be again brought into the said limitation proceedings previously instituted by said Shipowners and Merchants Tugboat Company in the District Court of the United States for the Northern District of California, after said Hammond Lumber Company had been dismissed from said proceedings and said judgment and decree dismissing said Hammond Lumber Company from said proceedings had become a final judgment.

### VIII.

The District Court erred in holding and deciding that the claim as made by the Hammond Lumber Company in the Circuit Court of Oregon in and for the county of Clatsop does not exceed the fund surrendered in the proceedings instituted by petitioner in the District Court of the United States for the District of Oregon to limit its liability, if any, for any loss or damage occasioned or incurred upon a certain voyage of the steam tugs "Dauntless" and "Hercules" in said proceedings referred to.

### IX.

The District Court erred in holding and deciding that the amount of the claim made by said Hammond Lumber Company in the suit pending in the Circuit

Court of the State of Oregon, in and for the county of Clatsop is alone to be determined by the State of the pleadings and the amount claimed therein.

X.

The District Court erred in holding and deciding that the sum asked for by said Hammond Lumber Company in said suit in [92] the State court was an estimate or assertion of counsel, based on his construction of the testimony and the law applicable, and not a claim for a sum in excess of the appraised value of the tugs "Dauntless" and "Hercules."

XI.

The District Court erred in holding and deciding that the Hammond Lumber Company had not made a claim against the Shipowners and Merchants Tug-boat Company in excess of the appraised value of the tugs "Dauntless" and "Hercules."

XII.

The District Court erred in not proceeding to trial upon the issues made by the petition, claim and answer of Hammond Lumber Company, to determine the liability of the petitioner for any act of the tugs "Dauntless" and "Hercules," and, if any liability was found to exist, in not then proceeding to determine the right of said petitioner to a limitation of liability therefor.

XIII.

The District Court erred in not holding and deciding that it had jurisdiction to proceed to a trial upon the issues raised by the petition, claim and answer of Hammond Lumber Company.

XIV.

The District Court erred in not overruling the exceptions of the Hammond Lumber Company to the petition of Shipowners and Merchants Tugboat Company and in not denying the motion of said Hammond Lumber Company to dismiss said petition.  
[93]

WHEREFORE, petitioner and appellant prays that the judgment and decree of the lower court be reversed.

IRA A. CAMPBELL,  
E. B. TONGUE,  
SNOW, BRONAUGH & THOMPSON,  
McCUTCHEN, OLNEY & WILLARD,  
Proctors for Petitioner and Appellant.

Filed October 19, 1917. G. H. Marsh, Clerk.

[94]

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And afterwards, to wit, on the 20th day of October, 1917, there was duly filed in said court, a Prae-cipe for Transcript, in words and figures as follows, to wit: [95]

*In the District Court of the United States, for the  
District of Oregon.*

No. 7220.

In the Matter of the Petition of the SHIP-  
OWNERS AND MERCHANTS TUGBOAT  
COMPANY, a Corporation, Owners of the  
Steam Tugs "DAUNTELESS" and "HER-  
CULES," for Limitation of Liability.

**Praecipe for Apostles on Appeal.**

To the Clerk of the Above-entitled Court:

Please prepare apostles on appeal in the above-entitled cause and include therein the following from the record of said cause:

The petition to limit liability.

Restraining order entered July 21, 1916.

Exceptions of Hammond Lumber Company to the petition.

Claim of Hammond Lumber Company.

Answer of Hammond Lumber Company.

Motion to dissolve injunction, etc.

Opinion of the Court.

Final Decree.

Notice of Appeal, and Assignment of Errors.

IRA A. CAMPBELL,

SNOW, BRONAUGH & THOMPSON,

Proctors for Petitioner.

Filed October 20, 1917. G. H. Marsh, Clerk.

[96]

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**Certificate of Clerk U. S. District Court to Apostles  
on Appeal.**

United States of America,

District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 96, inclusive, constitute the Apostles on Appeal in the cause in said court, In the Matter of the Petition of the Shipowners and Merchants Tugboat Com-

pany, a Corporation, Owners of the Steam Tugs "Dauntless" and "Hercules," Petitioners for Limitation of Liability, Appellant; The Hammond Lumber Company, a Corporation, Claimant and Appellee; that the said apostles contain the caption, and a full, true and correct transcript of the record and proceedings had in said court in said cause, as the same appear of record and on file at my office and in my custody, in accordance with the rules of court and the praecipe of the appellant.

And I further certify that the cost of the foregoing Apostles is \$28.10, and that the same has been paid by the said appellant.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said Court at Portland in said District, this 23d day of October, 1917.

[Seal]

G. H. MARSH,

Clerk. [97]

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[Endorsed]: No. 3070. United States Circuit Court of Appeals for the Ninth Circuit. Shipowners and Merchants Tugboat Company, a Corporation, Appellant, vs. The Hammond Lumber Company, a Corporation, Appellee. Apostles on Appeal. Upon Appeal from the United States District Court for the District of Oregon.

Filed October 25, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.